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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re HAWKES.
ACKERMAN *v.* LOCKHART.

[1896 H. 1382.]

C. A.
1898
Feb. 24, 25; *March* 23.

Solicitor's Lien—Administration Action—Documents in Solicitor's Possession before Action—Third Parties—Right to Production.

A solicitor having a lien on documents in his possession belonging to his client, a party to an action, may not embarrass proceedings taken in the action by a third party by refusing to produce the documents if wanted by that third party for the purpose of his proceedings, even though the documents may have come into the solicitor's possession before the commencement of the action.

At the time of the death of a testator his solicitor, C., had in his possession certain documents belonging to the deceased and on which he, C., had the ordinary solicitor's lien. Subsequently the executors of the deceased employed C. to institute an action for the administration of the estate, and the usual administration judgment was pronounced. The action after judgment not being prosecuted with due diligence, conduct of the proceedings was, by order, given to a creditor, the estate being insolvent. The executors however remained parties and C. continued to act for them:—

Held, by the Court of Appeal (affirming Kekewich J.) that, notwithstanding his lien, C. was bound to produce to the creditor the documents in his, C.'s, possession, to enable the creditor to take steps for getting in a mortgage debt due to the estate.

The principles and extent of a solicitor's lien discussed.

APPEAL from Kekewich J.

George Hawkes, the testator in the cause, died on August 31,

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1895. He had employed during his lifetime a Mr. Cridland as his solicitor, and in the course of such employment Mr. Cridland had in his possession certain deeds or documents belonging to the testator. At the date of the death a considerable sum was due from the testator to Mr. Cridland for costs and money lent.

In May, 1896, the testator's executors employed Mr. Cridland to institute an action for the administration of the estate; and the above action for that purpose was accordingly commenced by the executors, Mr. Cridland acting for them, and the usual administration judgment was pronounced. The action not being prosecuted with due diligence, an order was made on May 14, 1897, giving the conduct to one Pearce, a creditor. The executors remained parties to the action and Mr. Cridland continued to act for them. The estate turned out to be insufficient for payment of creditors.

While conducting the proceedings in the action Pearce desired to take steps for enforcing an outstanding mortgage security for 1977*l.* forming part of the testator's estate, and applied to Mr. Cridland to produce the documents in his possession to enable him, Pearce, to prepare a case for counsel to advise as to whether steps should be taken to enforce the security, and if so as to the course of proceeding; but Mr. Cridland refused to produce the documents, claiming to have the ordinary solicitor's lien on them both for the costs which had been incurred to him by the testator, and also for the costs incurred to him by the executors in the administration action. Thereupon Pearce took out a summons to compel the production, and on February 7, 1898, an order was made on that summons by Kekewich J. in chambers, in the presence of the plaintiffs and of Mr. Cridland, their solicitor, giving the applicant leave to prepare and lay before counsel a case to advise whether any and what proceedings should be taken to enforce the mortgage in question: and on the plaintiffs' solicitor, Mr. Cridland, by his counsel admitting that he had in his possession the documents specified in the schedule to the order, it was ordered that he should upon forty-eight hours' notice, at all reasonable times, produce at his office to the

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applicant's solicitors for their perusal the said documents and any other documents in his possession an inspection of which was necessary to enable the case to be prepared; and Mr. Cridland was ordered to pay the costs of the application.

The documents specified in the schedule to the order were three in number, one being a written statement by the testator in relation to various documents executed by him with reference to the said mortgage and other matters.

Notice of appeal from that order was given by the plaintiffs, through their solicitor Mr. Cridland, the notice also asking that the plaintiffs, the executors, might be at liberty to take all necessary and proper steps to obtain payment of the mortgage debt of 1977*l*.

The appeal was heard on February 24 and 25, 1898.

Upon the appeal being opened it was agreed that the notice of appeal should be amended by substituting Mr. Cridland for the plaintiffs as the appellant, and leave was given to amend accordingly. The argument then proceeded on the footing of the amendment having been made.

It appeared that under the accounts and inquiries directed by the judgment Mr. Cridland carried in a claim for costs and money lent prior to the decease of the testator, and that on the claim coming before him the master allowed Mr. Cridland to prove and referred five bills of costs for taxation.

P. Rose-Innes, for the appellant Mr. Cridland. The question is whether the judge could order production of documents on which the plaintiffs' solicitor, Mr. Cridland, has a lien, without his lien being satisfied.'

Mr. Cridland's position is this. He admits that if the documents in question had come into his possession in the course of the administration action, he would not be able to embarrass the action by retaining them, but that is not the case here. The documents came into his possession in the lifetime of the testator, that is, before the commencement of this litigation. He is the solicitor to the executors the plaintiffs in the action, but the conduct of it has been taken out of their hands. He could have enforced his lien against the testator if he had been

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living, and he can therefore do so as against the executors, or the persons having the conduct of the action, however embarrassing that may be to them. That contention is warranted by the authorities: *In re Faithfull* (1), *In re Boughton* (2), *In re Capital Fire Insurance Association* (3), and *Boden* v. *Hensby.* (4)

[LINDLEY M.R. referred to *Ex parte Yalden.* (5)

RIGBY L.J. In the cases referred to the solicitor had ceased to act as solicitor in the action.]

There may be a question whether Mr. Cridland has not, in effect, been discharged. Kekewich J. seemed to think that there was a difference between an administration action and other cases, but that cannot be so. Even when there is an action a solicitor can enforce his lien, except as regards documents which came into his possession for the purposes of the action.

[RIGBY L.J. Is there any case where a solicitor has been allowed to stop an administration action by setting up his lien?]

Perhaps not exactly that, but it would seem that he would have a right to his lien: *Lord* v. *Wormleighton.* (6)

[LINDLEY M.R. referred to *Warburton* v. *Edge* (7) and *Bennett* v. *Baxter.* (8)]

Stewart-Smith, for the respondent Pearce. The order is for the production of the documents, not that they should be handed over. There is a distinction between the two. Whether there is a lien or not, the Court can order the production of any documents relating to the estate which are necessary for the administration. No case has been cited where any limit has been put on that power by reason of lien.

[VAUGHAN WILLIAMS L.J. Suppose the question had been as to a mortgage, could not the person in whose custody it is be made to produce it under a subpœna?]

Yes. The creditor having conduct of the proceedings could make him produce it though not claiming through the mortgagor: *Hope* v. *Liddell.* (1) The Court will not allow any legal proceedings to be embarrassed by a solicitor's lien, even where the documents came into his possession before the proceedings commenced: *Ex parte Bramble* (2) and *Pratt* v. *Pratt.* (3)

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(1) (1868) L. R. 6 Eq. 325.
(2) (1883) 23 Ch. D. 169.
(3) (1883) 24 Ch. D. 408.
(4) [1892] 1 Ch. 101.
(5) (1876) 4 Ch. D. 129.
(6) (1822) Jac. 580.
(7) (1839) 9 Sim. 508.
(8) (1840) 10 Sim. 417.

The lien of a solicitor does not prevent the client from inspecting the documents: *Lockett* v. *Cary.* (4) *Simmonds* v. *Great Eastern Ry. Co.* (5) shews that under similar circumstances to those in the present case the solicitor of the original plaintiff must, notwithstanding his lien, produce documents necessary for drawing up the decree.

[Lindley M.R. That case was decided on *Ross* v. *Laughton* (6), which shews that the point in the present case was not before the Court.

Vaughan Williams L.J. In *Ross* v. *Laughton* (6) the order was restricted to documents received during the litigation.]

Even when a solicitor has been discharged he cannot set up an absolute lien on documents which came to him during the litigation: *Belaney* v. *Ffrench.* (7)

In that case and in *Warburton* v. *Edge* (8) the solicitor had been discharged by the client; but Mr. Cridland is in the position of a solicitor who has discharged himself, so that the Court will order him to deliver up these papers: *Bennett* v. *Baxter* (9); *Robins* v. *Goldingham* (10); *In re Boughton* (11), where Fry J. states the true rule, namely, that a solicitor cannot so assert his lien as to embarrass the progress of an administration action.

[Lindley M.R. None of those cases refer to a lien acquired before the commencement of the litigation.]

In re Capital Fire Insurance Association (12) was a case, not of administration, but of winding-up under the special jurisdiction of the Companies Acts. Cotton L.J. points out the distinction. (13)

(1) (1855) 7 D. M. & G. 331.
(2) (1880) 13 Ch. D. 885.
(3) (1882) 51 L. J. (Ch.) 838.
(4) (1864) 10 Jur. (N.S.) 144.
(5) (1868) L. R. 3 Ch. 797.
(6) (1813) 1 V. & B. 349.
(7) (1873) L. R. 8 Ch. 918.
(8) 9 Sim. 508.
(9) 10 Sim. 417.
(10) (1872) L. R. 13 Eq. 440.
(11) 23 Ch. D. 169, 170.
(12) 24 Ch. D. 408.
(13) 24 Ch. D. 417, 420.

[VAUGHAN WILLIAMS L.J. referred to *Bell* v. *Taylor*. (1)]

Mr. Cridland has submitted to the jurisdiction of the Court. He has brought in a claim in this action, his proof has been allowed and his bills referred for taxation. He has thus taken the benefit of the decree and he cannot embarrass the administration of the estate by refusing to produce documents which he holds as security.

P. Rose-Innes, in reply. Mr. Cridland has not been constructively self-removed. He had a legal right of action against the testator for his bill of costs, and has not prejudiced that right by accepting a retainer from the executors, or by proving in the action. The case most in favour of the respondents on the latter point is *Ex parte Bramble* (2); but that was a case in bankruptcy, decided on s. 96 of the Bankruptcy Act, 1869, and does not apply here. I rely on the statement of North J. in *Boden* v. *Hensby* (3), that the rule in *In re Boughton* (4) does not apply to documents come to the hands of the solicitor previously to the action.

Cur. adv. vult.

March 23. LINDLEY M.R. This is an appeal by a solicitor from an order of Kekewich J. ordering him to produce certain documents on which he has a lien. The facts are as follows: [His Lordship then stated them, and after reading the order appealed from proceeded:—]

Cridland has appealed against this order; the ground of his appeal being that the documents ordered to be produced came into his possession, not from the executors for the purposes of the action, but from the deceased in his lifetime, and that he, Cridland, had a lien on them before and at the time of his original client's death and before any retainer by his executors.

A great number of authorities were referred to by counsel, but none of them were actually in point, and it is necessary to consider the question for decision on principle. A solicitor's lien is simply a right to retain his client's documents as against the client and persons representing him. As between the

(1) (1836) 8 Sim. 216.
(2) 13 Ch. D. 885.
(3) [1892] 1 Ch. 101.
(4) 23 Ch. D. 169.

solicitor and third parties, the solicitor has no greater right to refuse production of documents on which he has a lien than his client would have if he had the documents in his own possession. This principle is as applicable at law as it is in equity. Accordingly, it has been long settled that if a solicitor is required by his client to produce documents under a subpœna duces tecum the solicitor can refuse to do so if he has a lien on them; but that the lien is no answer to a demand for their production by a third party: see *Hope* v. *Liddell* (1); *Hunter* v. *Leathley*. (2) This doctrine is not confined to production under the exigency of a subpœna duces tecum. The same principle applies to other applications for production by solicitors who are acting for their clients in litigation: see, at law, *Ley* v. *Barlow* (3) and, in equity, *Furlong* v. *Howard*. (4) Nothing can be clearer than Lord Redesdale's judgment in this last case: "Though a solicitor may have a lien on a deed for his costs, yet if his client is bound to produce it for the benefit of a third person, so also must the solicitor. I know this is not so understood in general; but the common opinion, that the solicitor may withhold it from all parties, in such a case is erroneous. The right is only as between his client and him." It is on this principle that Courts of Equity order solicitors acting for clients who are parties to actions to produce documents on which the solicitors have a lien, if their production is necessary for the purpose of doing justice to other persons besides their respective clients. Administration actions are the most familiar instances of such actions. But the principle is not confined to them. As, however, we are dealing with an administration action, I will refer only to such actions.

It must not be forgotten that before the Judicature Acts a creditor could be restrained from enforcing his debt at law after a decree for the administration of his debtor's estate, and a Court of Equity never allowed the creditors to be defeated by allowing the proceedings under the decree to be embarrassed by the liens of the solicitors of the parties. The solicitors of the parties to the proceedings are not deprived of their liens and

(1) 7 D. M. & G. 331.
(2) (1830) 10 B. & C. 858.
(3) (1848) 1 Ex. 800.
(4) (1804) 2 Sch. & Lef. 115.

treated as if they had none; but they are not allowed to render the proceedings abortive by refusing to produce documents in their possession which are wanted by other persons than their own clients, and which such other persons have a right to see. But, even as between solicitor and client, where the client is a party to an action his solicitor may be bound to produce for the purposes of the action any documents of the client which are wanted for the purposes of the action, and which have come into the solicitor's possession in the course thereof, or for the purpose of conducting the same: see *Ross* v. *Laughton* (1) and other cases collected in 2 Dan. Chy. Pr. 1717 (5th ed.). This rule, however, does not cover the present case.

To return to administration actions: if a creditor sued his debtor or his executor at law, and required the defendant's solicitor by a subpœna duces tecum to produce a document belonging to the defendant, but in the possession of the solicitor who had a lien upon it, I take it to be plain that the lien would not justify the solicitor in refusing to produce the document; and *Ley* v. *Barlow* (2) shews that an order for its production might be made even before trial without a subpœna.

If these are the principles on which the Court acts in an administration action; if the production is ordered for the purpose of preventing the legal rights of creditors from being defeated, it cannot matter whether the documents which are wanted came into the hands of the solicitors of the parties before or after the death of the deceased, or before or after the commencement of the action for administration; nor can it matter whether the executors are plaintiffs or are defendants, nor who has the conduct of the action. Having regard to the rights of the creditors, if Hawkes' executors now had the conduct of the action, their solicitor could not, in my opinion, effectually rely on their lien on the documents of the deceased to prevent their production for the purpose of enabling the executors to get in the assets of the deceased. The rights of the creditors under the administration judgment, and their inability to sue at law, explains the apparent anomaly that the executors should be entitled to obtain production from their own solicitor of documents on

(1) 1 V. & B. 349.

(2) 1 Ex. 800.

which he has a lien as against them. The fact that they have been deprived of the conduct of the action does not improve the solicitor's position so long, at all events, as his clients remain parties to the action and have not discharged him: see on this point *Bennett* v. *Baxter* (1); *Simmonds* v. *Great Eastern Ry. Co.* (2) Mr. Cridland's clients are still parties, and he acts for them. It is unnecessary, therefore, to consider what his right might be under other circumstances.

The general rule of the Court, founded on the principles above referred to, is very emphatically stated in *Belaney* v. *Ffrench.* (3) That was an administration suit, and it was the case of a solicitor who had acted for several of the parties to it and had been discharged by them, and who refused to produce documents belonging to them but on which he had a lien. The receiver who had been appointed in the action wanted to see the documents. James L.J. said: "A solicitor cannot embarrass a suit by keeping papers which belong to an estate which is being administered by the Court, and cannot use that means of obtaining payment." *In re Boughton* (4) is another decision to the same effect, and Fry J. there points out the importance of the rights of creditors. It is, however, true that the documents which were in question in these cases came into the solicitor's hands from the clients who discharged them. The point, therefore, made before us by the appellant's counsel had not to be considered.

I proceed now to examine the authorities more particularly relied upon by the appellant in support of his contention. The first and most important is *Warburton* v. *Edge.* (5) The facts of that case are not very clearly stated, but as I understand them there was an administratrix abroad; she had a solicitor here who had acted for her in a suit for the administration of her deceased's estate, but who had been instructed by her to act for her no longer. A receiver had been appointed. The solicitor had some documents which came into his hands after the death of the deceased, and on which he claimed a lien not only for the costs of the suit, but for other costs due to him from the administratrix before the commencement of the suit. The plaintiffs were creditors of the deceased, and they petitioned for an order of a very unusual nature. They prayed for an order on the solicitors to deliver to the receiver, or to deposit with the master, all deeds, &c., in his custody relating to the personal estate of the deceased, subject to any lien the solicitor might claim, and as to the amount due to him in respect of it; and if necessary for a taxation of his bill of costs, to the intent that it might be paid out of the estate of the deceased. Shadwell V.-C. refused to make any order on this petition. He said the plaintiffs had no right to the production of the documents, as some of them had come into the solicitor's hands before the suit commenced, and he had a lien on them for costs incurred in other business besides the conduct of the suit. The Vice-Chancellor also said the plaintiffs had no right to tax the solicitor's bill. The petition being really a petition by a creditor for the taxation of the solicitor's costs and for payment of them by the administratrix, the order of the Vice-Chancellor seems to have been right. But if he meant to say that the creditor had no right to have the documents produced for the purposes of the action because of the lien, the Vice-Chancellor, in my opinion, went too far. Having regard to what he said in *Baker* v. *Henderson* (1), he may have meant to go this length. That case presents no difficulty, although the first few words of the judgment were relied on by counsel for the appellant. In *In re Capital Fire Insurance Association* (2) an order was made to wind up a company. The company had employed a solicitor who, when the petition for a winding-up order was presented, had a lien on some documents which the liquidator wanted. Chitty J. made an order directing the solicitor to deliver these documents to the liquidator, but subject to the solicitor's lien. On appeal, this order was discharged as to some of the documents, namely, those referred to in the second order, on which the solicitor had a lien before the petition was presented. The ground of this decision, as I understand it, was that the solicitor was not the solicitor of the liquidator in the winding-up proceedings, and was not acting for the company in those proceedings (see per Cotton L.J. (1)), the liquidator having employed another solicitor. The Court moreover pointed out that as to these documents the liquidator could obtain production of them under the winding-up sections of the Companies Act, 1862, as decided in *In re South Essex Estuary and Reclamation Co.* (2) No doubt Cotton L.J. said (3) that *In re Boughton* (4) did not apply to "such a case." By this expression I understand was meant the case of documents in the hands of a solicitor before an administration suit commenced, and which solicitor was not employed in that suit by the client against whom the lien could be asserted. In such a case the solicitor would be a stranger to the litigation, and could not be compelled to produce documents except as a witness by a subpœna duces tecum. That was the sort of case which Cotton L.J. had to consider. I do not understand the observation to apply to the case of a solicitor employed in an administration suit by a party to the suit, and who could be made by the other parties or by creditors to produce the documents otherwise than by subpœna.

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(1) 10 Sim. 417.
(2) L. R. 3 Ch. 797.
(3) L. R. 8 Ch. 918, 920.
(4) 23 Ch. D. 169.
(5) 9 Sim. 508.

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(1) (1830) 4 Sim. 27.

(2) 24 Ch. D. 408.

Boden v. *Hensby* (5) was a partition action. The plaintiff had changed his solicitor, and it was held that the solicitor could not be compelled to produce documents on which he had a lien before the action was commenced, although he could not withhold those which came into his possession afterwards. North J., who decided that case, acted on the authority of *In re Capital Fire Insurance Association.* (6) If third parties were entitled to have the documents produced, *Boden* v. *Hensby* (5) went too far in favour of the solicitor.

These were the principal authorities referred to, and the only ones which it is necessary to notice. None of them appear to me to compel the Court to reverse the order appealed from. It seems to me right in principle, and the appeal, therefore, ought to be dismissed with costs.

Rigby L.J. In this case the applicant was a creditor of the deceased person whose estate is being administered, and the

(1) 24 Ch. D. 417.
(2) (1869) L. R. 4 Ch. 215.
(3) 24 Ch. D. 420.
(4) 23 Ch. D. 169.
(5) [1892] 1 Ch. 101.
(6) 24 Ch. D. 408.

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conduct of the cause has been transferred to him. Mr. Cridland has acted for the plaintiffs from the commencement of the action and does so now, so that there can be no question as to his having been discharged, if that be material. The order made is for production only, that being apparently sufficient for the purpose of ascertaining what information useful for the statements in the case to be laid before counsel the documents contain.

But for the fact that the lien arose before the action was commenced, there could, I think, be no question, on the decided cases, that the order appealed from is correct. The question will turn out to be, in my judgment, one of procedure only. There can be no doubt of the right of the creditor to production; and the only question which can arise is whether that right should be enforced against the solicitor as a witness, or whether a summary order in the action is, according to the course of practice, permissible. As to documents which the solicitor has obtained in or for the purposes of the action, it is clear that a summary order in the action may be made. The only possible doubt is as to those on which he had a lien before the action. Whether the lien was acquired from the testator or his executors seems to me to be immaterial at law.

The very case seems to me to have been decided in *Ley* v. *Barlow* (1), where inspection before trial was ordered of documents which were in the possession of the attorney of a party to the action notwithstanding that he had possession of a lien upon them before action.

This case has not, to my knowledge, ever been questioned. It was, however, apparently decided on the authority of *Hunter* v. *Leathley* (2), which had reference to a witness required by a subpœna duces tecum to produce the document under consideration; and more especially of *Steadman* v. *Arden* (3), where it is not clear to me that the lien was insisted upon. It may be possible, therefore, to suggest that the distinction was not so clearly brought before the Court as to make the case a conclusive authority. Although, therefore, I am of

(1) 1 Ex. 800.
(2) 10 B. & C. 858.
(3) (1846) 15 M. & W. 587.

opinion, as will hereafter appear, that the case was well decided, and that the doctrine is the same in equity as at law, yet, having regard to the numerous cases cited before us in arguments and to a certain amount of confusion and apparent conflict between them, I think it better to discuss the present case on principle supported by some authorities which cannot be questioned.

The clear statement of the limit to the right of a solicitor to refuse production of documents on which he has a lien, enunciated by Lord Redesdale in the case of *Furlong* v. *Howard* (1), may be and has been rested on the very general rule that no one can give greater rights to another than he has himself. The owner of a document who would himself be obliged to produce it for the purposes of justice cannot give to his solicitor a right to refuse production.

Lord Redesdale's statement of the law in *Furlong* v. *Howard* (1) is only one of many statements to the like effect to be found in the books, though it is a very clear and important instance. The principle itself is so obviously just that I do not think it requires any further support on authority; and I only go into the authorities for the purpose of shewing that it has, down to the present time, been recognised, in order to get rid of any argument that might be set up that the law has been changed.

In addition to the cases already mentioned of *Hunter* v. *Leathley* (2) (where the lien was a broker's lien on a policy of insurance, but the principle is the same) and *Ley* v. *Barlow* (3), I may refer to the following cases. In *Commerell* v. *Poynton* (4) Lord Eldon said (5): " A solicitor cannot, by virtue of his lien, prevent the king's subject from obtaining justice." The same principle is to be found enunciated throughout the whole of the carefully considered judgment of Lord Sugden in *Blunden* v. *Desart.* (6) In *Brassington* v. *Brassington* (7), treated as undoubted law in *Hope* v. *Liddell* (8), Sir John Leach says (9):

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(1) 2 Sch. & Lef. 115.
(2) 10 B. & C. 858.
(3) 1 Ex. 800.
(4) (1818) 1 Swans. 1.
(5) 1 Swans. 2.
(6) (1842) 2 D. & War. 405.
(7) (1823) 1 S. & S. 455.
(8) 7 D. M. & G. 331.
(9) 1 S. & S. 457.

"It would be very extraordinary if a deed by which property is conveyed were to be of no effect, because the party who executed the deed did not choose to pay his solicitor's bill. It may be reasonable that the husband" (the document was a marriage settlement), "if calling for the deed for his own purposes, should not have access to it until the solicitor's claim was satisfied; but to refuse to produce it as a witness for the other party cannot be justified." In *Hope* v. *Liddell* (1), above referred to, Knight Bruce L.J. says (2): "If Benjamin Norton and Edward Spencer Norton" (the persons against whom the lien was claimed) "were now alive, and either of them had actual possession of the deed, he would be compellable certainly to produce it for the purpose of evidence at the instance of these defendants. Why then . . . . should not Mr. Clipperton" (the solicitor claiming a lien) "do so? I think that he ought." And Turner L.J. says that he had long thought the question settled by *Brassington* v. *Brassington.* (3)

In re South Essex Estuary and Reclamation Co. (4) Lord Hatherley L.C. made, under s. 115 of the Companies Act, 1862, an order for production against a solicitor claiming a lien on documents belonging to a company in liquidation. The Lord Chancellor, after referring to the case of a client asking for production without having paid his solicitor's bill, said, it was equally beyond doubt that a solicitor would have been ordered to produce on a subpœna duces tecum obtained by a creditor or third party. He then decides the case on the ground that under the Companies Act the official liquidator represented the creditors as well as the company. This is an express decision of the Lord Chancellor that a creditor is not a person who claims through or under the client so as to be in the same position with him, but is a person claiming hostilely to him so as to be entitled to the full benefit of Lord Redesdale's statement of the law in *Furlong* v. *Howard.* (5) In *Belaney* v. *Ffrench* (6) James L.J. says: "But a solicitor cannot embarrass a suit by keeping papers which belong to an estate which is

(1) 7 D. M. & G. 331.
(2) Ibid. 336.
(3) 1 S. & S. 455.
(4) L. R. 4 Ch. 215.
(5) 2 Sch. & Lef. 115.
(6) L. R. 8 Ch. 920.

being administered by the Court, and cannot use that means of obtaining payment."

It may be, as suggested by Cotton L.J. in *In re Capital Fire Insurance Association* (1), that in *Belaney* v. *Ffrench* (2) only papers in the cause were being dealt with; but I do not think that the generality of the language used by James L.J. ought to be limited, though the case itself would, if Cotton L.J. is right as to the facts, be no authority as to the way in which production of deeds on which a lien attached prior to suit is to be procured against a solicitor who had been discharged. Cotton L.J., in *In re Capital Fire Insurance Association* (1), says that a solicitor can claim no greater lien than the person who puts the documents into his hands is capable of creating. Many of the cases dealt with by me involve the same principle, and there are other decisions which might if necessary be cited to the same effect. See, for instance, Fry J. in *In re Boughton*. (3)

These authorities make it clear that the principle enunciated by Lord Redesdale in *Furlong* v. *Howard* (4) has never been modified, and any dicta or even any decisions, if there be any, which are contrary to that principle must be wrong.

I now go to the consideration of the remedies against a solicitor to enforce production or delivery notwithstanding his lien.

First, of course delivery of the documents may be enforced by way of redemption, as in *Christian* v. *Field* (5), where the plaintiff in a creditor's suit (*Christian* v. *Chambers*), who had in that suit obtained a decree for sale of real estate of a testator for the payment of his debts, was held entitled to maintain a suit (*Christian* v. *Field* (5)) to redeem title deeds held by a solicitor of the testator claiming a lien but an entire stranger to the creditor's suit. In that case redemption was the only effectual remedy, since the deeds were wanted for the purpose of delivering them to a purchaser.

Secondly, where there is no litigation in which the solicitor

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(1) 24 Ch. D. 408.

(2) L. R. 8 Ch. 918.

(3) 23 Ch. D. 169.

(4) 2 Sch. & Lef. 115.

(5) (1842) 2 Hare, 177.

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acts or has acted for one of the parties, the usual course is to summon him as a witness on a subpœna duces tecum and to require him to produce the documents on which he claims a lien. Several of the cases above referred to, including *Brassington* v. *Brassington* (1) and *Hope* v. *Liddell* (2), are of this nature; and there are many other cases, both at law and in equity, which might be cited. There is no case, so far as I know, where production has not been enforced against a solicitor notwithstanding the lien, if the person demanding production could have enforced production against the client. Consistently with Lord Redesdale's statement in *Furlong* v. *Howard* (3) there could be no such case.

Thirdly, there are innumerable instances in which a solicitor has been ordered summarily to produce or deliver without prejudice to his lien where he is or has been solicitor to a party plaintiff or defendant. Perhaps the most common case is that now before us, namely, an administration action, though the practice is not confined to administration actions. Wherever the Court has taken upon itself the administration of or dealing with an estate for the benefit of persons other than those against whom the lien authorizes a refusal to produce, it has been the practice to enforce production in a summary way by order in the action against the solicitor of any party. *Ley* v. *Barlow* (4) has been already indicated as a case of this kind at law. No case has been produced which shews that any difference is to be made, so long as the solicitor continues to act as solicitor in the action, with reference to a lien existing before suit and one arising during the pending action. Nor can there be any such difference in principle. A solicitor who engages to act for a party to an action impliedly agrees that he will not use his lien on any documents required for the purposes of the action so as to embarrass the prosecution of it.

This conclusion would be sufficient for the purposes of this appeal, but many cases of the exercise of the summary jurisdiction have been cited, and it may be desirable to see whether any of them are adverse to the proposition laid down. The

(1) 1 S. & S. 455.
(2) 7 D. M. & G. 331.
(3) 2 Sch. & Lef. 115.
(4) 1 Ex. 800.

first cases of this kind that I need mention are *Ross* v. *Laughton* (1) and *Commerell* v. *Poynton* (2), both decisions of Lord Eldon. In the first, on the application of assignees of a bankrupt defendant to an administration action in which a decree had been made, Lord Eldon made an order for production against the defendant's solicitor notwithstanding his lien. In the second, Lord Eldon, on the application of a defendant against his solicitor who had refused to proceed in the action, ordered the solicitor to permit inspection by the defendant for the purposes of the action, and directed production by the solicitor before the master for the purposes of the action. I mention these cases because Lord Eldon has been supposed to have withdrawn somewhat from the doctrine involved in them by what fell from him in *Lord* v. *Wormleighton*. (3) Lord Eldon's decision in the last-mentioned case has been referred to as more favourable to the solicitor's lien than the earlier cases. The case itself has frequently been misunderstood. It has been argued that Lord Eldon there laid down something inconsistent with the former decisions in *Ross* v. *Laughton* (1) and *Commerell* v. *Poynton* (2) and his subsequent decision in *Colegrave* v. *Manley*. (4) Lord Cottenham however, in *Heslop* v. *Metcalfe* (5), treats the case as quite consistent (6) with *Colegrave* v. *Manley* (4), and (7) with *Commerell* v. *Poynton*. (2) In like manner Wood and Selwyn L.JJ., in *Simmonds* v. *Great Eastern Ry. Co.* (8), expressly decided that *Ross* v. *Laughton* (1) was not overruled by it. In *Belaney* v. *Ffrench* (9) Bacon V.-C. said (10), referring to *Lord* v. *Wormleighton* (3), that Lord Eldon's words were greatly misunderstood if they were understood to say that a solicitor might, by detaining papers, embarrass the proper and rational progress of an administration suit. The opinion of James L.J. in the same case has already been cited, and both were expressly approved by Fry J. in *In re Boughton*. (11)

(1) 1 V. & B. 349.
(2) 1 Swans. 1.
(3) Jac. 580.
(4) (1823) T. & R. 400.
(5) (1837) 3 My. & Cr. 183.
(6) 3 My. & Cr. 187, 188.
(7) Ibid. 190.
(8) L. R. 3 Ch. 797.
(9) L. R. 8 Ch. 918.
(10) Ibid. 920.
(11) 23 Ch. D. 169.

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Having regard to all these explanations of *Lord* v. *Wormleighton* (1), it is impossible, I think, to treat that case as introducing any substantial change into the law as to a solicitor's lien. It is, in my judgment, only a decision against the exercise of summary jurisdiction in the case where a solicitor has not discharged himself but been in effect discharged, and his former client moves against him. *Colegrave* v. *Manley* (2), above referred to, is a very leading and important case on the subject of the summary jurisdiction. There Lord Eldon, in the case of a solicitor who had discharged himself, made an order that he, the late solicitor, should deliver to the new solicitor of his former client all the proceedings in the cause and all such deeds, evidences, papers, and writings whatsoever as had come into the possession or custody of the late solicitor belonging to the plaintiff and which related to the cause, subject to the lien of the late solicitor for the amount of what should be found due to him on the taxation of his bills of costs. The terms of this order are sufficiently wide to include papers and costs which respectively came into the solicitor's hands and were incurred before the commencement of the suit, though it does not clearly appear that there were any such.

In *Baker* v. *Henderson* (3) Shadwell V.-C., making an order on the plaintiff's solicitor for the production of documents in his possession for the purposes of the suit, takes notice that the solicitor had no lien on the documents anterior to the suit. This, however, only means that he had not to decide a question as to such an antecedent lien. In *Heslop* v. *Metcalfe* (4) the same learned judge, on the authority of *Colegrave* v. *Manley* (2), ordered delivery-up by a solicitor, held to have discharged himself, of papers in a suit to his client's new solicitor. This decision was affirmed on appeal by Lord Cottenham. (5) Lord Cottenham there also relies upon *Colegrave* v. *Manley* (2), and especially upon the following paragraph at page 402 of the report of that case: "So far as the use of papers is concerned, the suitor, when his solicitor discharges himself, must have his business conducted with as much ease and celerity, and as little expense, as if the connection of solicitor and client had not been dissolved."

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(1) Jac. 580.
(2) T. & R. 400.
(3) 4 Sim. 27.
(4) (1837) 8 Sim. 622.
(5) 3 My. & Cr. 183.

It does appear from the report of *Heslop* v. *Metcalfe* (1) that the papers were only papers in the cause, though the late solicitor claimed a lien thereon for his general costs outside the suit, but this fact was only relied upon as evidence of the solicitor having discharged himself; and there is not a word in the carefully considered judgment of Lord Cottenham to shew that he would have excluded from the order papers received before the commencement of the suit, and subject to a lien for general costs, if in fact they were necessary for the proper prosecution of the suit. The nature of the suit is not shewn by the report.

Warburton v. *Edge* (2) is a case which has been much discussed, and it is not easy to understand. I think that the true view of that case is that the petition presented by the plaintiffs, creditors of the deceased person whose estate was being administered, was an informal application for redemption of the documents referred to in it on terms which the plaintiffs had no right to impose, and that it was dismissed partly on that ground and partly on the ground that the plaintiffs had no locus standi. One main reason for the order given in the judgment (3) is that, because the solicitor had a lien on the documents prior to the right of the administratrix to take them out of his hands, the lien was consequently prior to the right of the plaintiffs, who were merely general creditors of the deceased's estate and could only take the estate as they found it. This seems to me to be in direct opposition to the string of authorities above cited, commencing with *Furlong* v. *Howard* (4), and deprives the case of any weight as an authority.

The next case which I think it worth while to deal with is that of *Bennett* v. *Baxter*. (5) It decided that the fact of the conduct of an administration suit being taken from the plaintiff

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(1) 3 My. & Cr. 183.
(2) 9 Sim. 508.
(3) 9 Sim. 514.
(4) 2 Sch. & Lef. 115.
(5) 10 Sim. 417.

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and given to another creditor did not entitle the plaintiff's solicitor to treat himself as discharged, or in a better position than if he had discharged himself, and gave the creditor having the conduct the right to inspect and take copies of all papers in the cause. On the authority of *Colegrave* v. *Manley* (1) an order for delivery, if asked for, might, I think, have been made. The constant recurrence of a distinction between the position of a solicitor discharging himself and that of one who has been discharged will be observed, and I think that there has been a good deal of misapprehension as to the meaning of those cases. In fact, they only apply to the exercise of summary jurisdiction to make an order in the suit. If a solicitor having a lien does not act, and never has acted, in the suit for a client party thereto, the course of procedure against him cannot in general be by way of application in the suit to which he is in every way a stranger. If he begins to act for a party he must, of course, be taken to be ready to do everything necessary for carrying on the suit effectually. He certainly cannot set up a lien acquired during the progress of the suit, so as to embarrass the proceedings in it; and no case that I have heard of has laid it down that he can, whilst acting in the suit, use in such a manner a previously acquired lien. If his client discharge him, it is obvious that such discharge cannot in substance affect the right to production of any third party. The utmost effect of any of the class of cases now being dealt with has been to place him, in the circumstances of the particular case, in the same position as if he never had been a party to the litigation; that is to say, to relieve him from the summary jurisdiction. Even as to this, I have not observed a case in which the summary jurisdiction has been cut down, except where the client himself or his representative has been the applicant, though I should hesitate to say that there are no cases to that effect.

If, on the other hand, the solicitor discharges himself, he has always been held to be in the same position as though he continued to act; that is to say, to be subject to the summary jurisdiction.

The case of *In re Capital Fire Insurance Association* (2),

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(1) T. & R. 400.

(2) 24 Ch. D. 408.

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already referred to, has been supposed to indicate that this summary jurisdiction cannot extend to the case of a lien acquired before the commencement of the litigation. I do not think that to be the meaning of the case. Cotton L. J. there guards himself carefully against appearing to lay down any such conclusion. At p. 417 of the report he says, with reference to the documents which the solicitor had possession of before September 18, 1882, that is, the commencement of the litigation: "They came to the hands of the solicitor before the presentation of the petition, and I see nothing to affect his lien." He cannot by these words have meant that the right of any person to insist upon the production on subpœna was taken away. When the three authorities relied upon by Chitty J. in the Court below were referred to he says: "None of them seem to me to govern the case. A solicitor employed in a suit is in a very different position." This case, I think, having regard to what has before been said, does not mean to deny that in a suit a solicitor to a party may be subject to the summary jurisdiction as to documents on which he acquired a lien before suit.

It is remarkable that in no case in which a solicitor has been held to be subject to the summary jurisdiction has there been any attempt to limit the summary jurisdiction by saying that it could not apply to a lien acquired before suit. It seems to me that it is more in accordance with common sense that the summary jurisdiction should, if it applies at all, be extended to all cases, than that an order under it should be confined to papers acquired in or for the purpose of the action, whilst as to those acquired before the action the procedure to compel production of the solicitor as a witness should necessarily be resorted to. My conclusion is that the case of *Ley* v. *Barlow* (1) should be maintained, and this appeal dismissed with costs.

VAUGHAN WILLIAMS L.J. I agree in the result; but, having been favoured with an opportunity of reading the judgments of the Master of the Rolls and Rigby L.J., prefer to give my own reasons, which differ considerably from those of the Master of the Rolls and the Lord Justice.

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(1) 1 Ex. 800.

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Now, I agree that it would seem to be an unsatisfactory state of the law if, in a case where the conduct of an administration suit is taken from the plaintiff-executor and given to a creditor, the solicitor for the plaintiff-executor should be able to embarrass the progress of the suit by refusing to produce documents on which he has a lien, even though he acquired such lien in respect of documents received from the testator in respect of work done for him; but if production by the solicitor of such documents is to be ordered, it is important to ascertain the principle on which the order is made. A precisely similar order was made in *Bennett* v. *Baxter* (1), but Shadwell V.-C. in that case based his order on the misconduct of the solicitor in delaying the suit, which misconduct led to the conduct of the suit being given to a creditor. No misconduct is, however, imputed to the solicitor in the present case, and it therefore becomes necessary to consider on what principle an order on the solicitor for production can be made in this case.

There can be no doubt but that the lien of the solicitor would not be a ground for refusal to produce the documents at the trial of an action, if the solicitor were served with a subpœna issued at the instance of any person other than the person against whom the lien came into existence, or some one claiming through him. *Hope* v. *Liddell* (2) is a clear authority for this. So also is *Furlong* v. *Howard* (3) and *Brassington* v. *Brassington.* (4)

This, however, would not justify the order to produce in this case, unless either it is right to make an order to produce before trial in every case in which production would be compelled at the trial by a person served with a subpœna duces tecum, or unless an executor in an administration action, or a creditor having the conduct of it, is to be treated as a person other than the testator or some one claiming under him.

It is said that there is no difference between the liability to produce at the trial and a liability to produce before the trial, and that whenever the one production can be compelled the other can also. I do not think that this is so. If it were so,

(1) 10 Sim. 417.
(2) 7 D. M. & G. 331.
(3) 2 Sch. & Lef. 115.
(4) 1 S. & S. 455.

one would have expected to find instances of orders on mere strangers to an action to produce documents which they had in their possession for inspection by a party to the action before trial. I know of no such cases. The report in *Furlong* v. *Howard* (1) is very short, and it is not at all clear from it that the order to produce was not an order to produce at the trial, or that the document was not an instrument in which the applicant who obtained the order had not an interest as a party thereto.

In *Ley* v. *Barlow* (2), and in *Steadman* v. *Arden* (3) and in *Hunter* v. *Leathley* (4), the applicant who obtained the order for production before trial had an interest as a contracting party in the document ordered to be produced for inspection, and at law it was always the practice, even before there was any statutory provision for discovery, to order the production of such documents for the purpose of pleading; but save for this purpose, and in the case of such documents, no order could be obtained to compel a third party, a stranger to the action, to produce documents for inspection in a cause: see *Cocks* v. *Nash* (5), where the whole subject is very fully discussed. Moreover, it is difficult to explain the refusal of the order for production and inspection in *Lord* v. *Wormleighton* (6), or the necessity to rely in *Bennett* v. *Baxter* (7) on the default of the attorney, if there was any broad general rule which could be invoked to the effect that every witness must produce for inspection before trial any document which he would be compelled to produce at the trial on a subpœna duces tecum. It seems to me important, in examining the authorities, to notice the distinction between an order for delivery-up of papers and an order for production of papers; and, again, the distinction between an order for the production of papers by a solicitor who by words or conduct has discharged himself, and an order for production by a solicitor who has been discharged, without misconduct on his part, by the client.

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(1) 2 Sch. & Lef. 115.
(2) 1 Ex. 800.
(3) 15 M. & W. 587.
(4) 10 B. & C. 858.
(5) (1833) 3 Moo. & Sc. 164.
(6) Jac. 580.
(7) 10 Sim. 417.

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The granting or refusal of an order for delivery-up of papers by the acting solicitor to the client does not involve the affirmation or negation of any obligation by a stranger to the action to produce a document which he holds subject to his lien; nor does the order for production by a solicitor who has discharged himself of documents received by him for the purposes of the cause: but an order on a solicitor discharged by the client to produce before the trial for inspection documents on which he has a lien might involve the affirmation of such an obligation by a mere witness to produce before trial documents on which he had a lien, for the solicitor in such case would, without any fault of his own, have become a stranger to the action; but I do not think it does.

The case of *In re Faithfull* (1) seems to me to lay down the rule that a discharged solicitor is under no obligation to deliver or even produce or allow inspection of papers on which he has a lien; and I am not aware that a solicitor thus discharged has any special rights or liabilities beyond those of other persons holding documents subject to a lien. But, on the other hand, it is clear law that in administration and other representative actions a discharged solicitor cannot resist production, at the instance of creditors, of documents received for the purposes of the action. Now what is the reason of this apparent anomaly? The reason seems to me to be that a solicitor, receiving from his client papers in the course of a cause for the purpose of doing justice to his client, thereby undertakes to produce them if necessary in the cause, and is not relieved from this undertaking by being discharged by the client, in so far as relates to the obligations incurred by the client in that cause. Even if this does not explain the anomaly, the fact remains that administration and other representative actions are at all events treated as a special class outside the general rule.

The very fact that in cases of orders for production, as distinguished from delivery, a distinction is drawn between papers received for the purposes of the cause and papers not so received—see *Ross* v. *Laughton* (2), *Commerell* v. *Poynton* (3), and *Vale* v. *Oppert* (1)—seems to point to the liability to produce for inspection being based, not on any general obligation, but on special obligations attaching to solicitors.

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(1) L. R. 6 Eq. 325.

(2) 1 V. & B. 349.

(3) 1 Swans. 1.

The result of all these considerations seems to be to shew that there is no liability in a mere stranger to produce documents on which he has a lien before the trial, or otherwise than at the trial in obedience to a subpœna.

This being my view, I will not trouble to consider how far the plaintiff in an administration action, as representing the creditors of the estate, can set up the rights of third persons to insist on the production under a subpœna, and I will now proceed to consider whether there is any special obligation on a solicitor, as such, to produce for inspection before trial documents in circumstances like those appearing in the present case.

The remedy against a solicitor who wrongfully refuses to produce or deliver up papers is by summary order against him as an officer of the Court. The obligations of a solicitor claiming a lien on papers received by him professionally and the extent of the remedy against him are defined in a long series of cases chiefly in courts of equity. These cases mostly turn on the difference in the obligation of a solicitor who has been discharged by the client and a solicitor who has discharged himself by refusing to continue to act. The present case differs from such cases in that the solicitor has not been discharged by the client or by his own refusal to act, but continues the solicitor in the cause. So far as relates to the cases of solicitors discharged by the client there is a long series of cases going to shew that a solicitor discharged by the client is liable to produce for inspection, or deliver up subject to his lien, all papers received for the purpose of the cause, in every case in which litigants other than his client are concerned, at the instance of such other parties; and creditors and others concerned in administration and other representative actions are treated for this purpose as parties to the litigation distinct from the client of the solicitor; but these cases all limit the obligation to papers received by the solicitor for the purpose of the cause and seem to exclude from the obligation papers on which the solicitor has a lien acquired prior to and irrespective of the cause. *Ross* v. *Laughton* (1), *Belaney* v. *Ffrench* (2), *In re Boughton* (3), *In re Capital Fire Insurance Association* (4), and *Boden* v. *Hensby* (5) are examples of this class of case.

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(1) (1875) L. R. 10 Ch. 340, 342.

It is difficult to reconcile *Lord* v. *Wormleighton* (6) and *Warburton* v. *Edge* (7) with the obligation to produce or deliver up in these cases. The distinction between *Ross* v. *Laughton* (1) and *Lord* v. *Wormleighton* (6), upon which the Lords Justices tried to reconcile them in *Simmonds* v. *Great Eastern Ry. Co.* (8), seems too narrow, as it would exclude administration actions from the scope of these cases.

The obligation of the discharged solicitor to produce in the cause papers received for the purpose of the cause in administration and other representative actions seems, however, well established. Now, what is the obligation of a solicitor who has not been discharged in reference to the production of papers? I cannot doubt but that he is bound to produce all papers received in the action. But does his obligation go further? Is he bound to produce papers received before the action on which he had already acquired a lien? I think he is. There is no direct authority; but the observations of Shadwell V.-C. in *Bennett* v. *Baxter* (9) and of the Lords Justices in *Simmonds* v. *Great Eastern Ry. Co.* (8) seem to shew that he is, and that this is an obligation, not towards persons other than his client, but to the client himself. The solicitor has a mere right of retainer, and the enforcement of that right seems to me inconsistent with the duty which he has undertaken to perform. He must, I think, be taken to have known, when he accepted the retainer, that it might be necessary to produce, under an order for discovery made on his client in the action, these papers upon which he had a lien, and to have waived by implication his lien so far as the production of the papers might prove necessary in the suit.

(1) 1 V. & B. 349.
(2) L. R. 8 Ch. 918.
(3) 23 Ch. D. 169.
(4) 24 Ch. D. 408.
(5) [1892] 1 Ch. 101.
(6) Jac. 580.
(7) 9 Sim. 508.
(8) L. R. 3 Ch. 797.
(9) 10 Sim. 417.

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This obligation is the same obligation which continues in its entirety if he voluntarily discharges himself. He must still continue to afford facilities for the prosecution of the suit. It is to be remarked also that there is no case reported in which a solicitor, while still the solicitor on the record, has ever successfully resisted or indeed attempted to resist this obligation on account of a lien acquired prior to the action, which is very remarkable, as the opportunity for making such a claim must have arisen again and again. I wish to add that, even if I am wrong in assuming that this is an obligation of the solicitor towards the client, the obligation might yet be held to arise in the case of an administration action, or any action in which the rights of other persons are concerned; but I prefer to rest my judgment on the ground of obligation to the client.

I may add that I think that *In re Capital Fire Insurance Association* (1) and *Boden* v. *Hensby* (2), in so far as these cases are authorities for limiting, in the case of a solicitor discharged by the client, the order, whether for production or delivery-up of papers, to papers received in the action, are in accordance with previous authority; and I wish further to add that I think that if *Colegrave* v. *Manley* (3) and *Heslop* v. *Metcalfe* (4) are looked at, there is nothing in them to shew that the orders were intended to extend to papers received by the solicitor before the action; but, on the contrary, the observations of Lord Cottenham and the Vice-Chancellor point in the opposite direction. The order in *Bennett* v. *Baxter* (5) is similarly limited to documents in the cause.

Solicitors: *Spencer Cridland & Co.; Frame & Son.*

(1) 24 Ch. D. 408.
(2) [1892] 1 Ch. 101.
(3) T. & R. 400.
(4) 3 My. & Cr. 183.
(5) 10 Sim. 417.

G. I. F. C.

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WRIGHT J.
Dec. 9, 10.
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March 24;
April 1.

In re MAYFAIR PROPERTY COMPANY.
BARTLETT *v.* MAYFAIR PROPERTY COMPANY.

[1896 M. 2261.]

Company—Power to Charge Uncalled Capital—Resolution under Companies Act, 1879 (42 & 43 *Vict. c.* 76), *s.* 5—*Debenture-holders—Winding-up—Priority.*

A limited company having, under its articles, power to issue debentures charging its assets including its uncalled capital, in October, 1892, passed a special resolution under s. 5 of the Companies Act, 1879, declaring that 5*l.* per share remaining uncalled up upon its ordinary 10*l.* shares should not be capable of being called up "except in the event of and for the purpose of the company being wound up." In June, 1894, when 5*l.* 15*s.* remained uncalled up, the company issued debentures charging all its undertaking and property, "including its uncalled capital for the time being," with the principal money and interest secured by the debentures. The company was afterwards ordered to be wound up, and the question arose whether the debentures issued by the company created a valid first charge upon the 5*l.* per share reserved capital so as to entitle the debenture-holders to payment thereout in priority to the other creditors and the cost of winding up:—

Held, by the Court of Appeal, affirming the judgment of Wright J., that, upon the true construction of s. 5 of the Act of 1879, the company had no power to create any charge on that portion of its capital which, in accordance with the resolution passed under that section, could only be called up "in the event of and for the purposes of the company being wound up."

The Companies Act, 1879, and the decisions in *In re Pyle Works*, (1890) 44 Ch. D. 534, and *Newton* v. *Anglo-Australian Investment, Finance and Land Co.*, [1895] A. C. 244, commented on, and explained.

THIS was an appeal by the holder of a debenture issued by the above-named company, and charging its uncalled capital, from a decision of Wright J. that the debenture created no charge upon that part of the capital of the company which could only be called up on the winding-up of the company.

The company was formed and registered as a limited company on August 16, 1892, with a nominal capital of 50,000*l.*, divided into 5000 shares of 10*l.* each. The memorandum of association stated (inter alia) that one of its objects was to borrow money and issue debentures charged upon "the property and rights of the company both present and future, including its uncalled capital." By the articles of association full power was given to the directors to issue debentures charging all the assets of the company, "including its uncalled capital."

Before this power was exercised, namely, on October 12, 1892, a special resolution was passed by the company under s. 5 of the Companies Act, 1879 (42 & 43 Vict. c. 76) (1), and it was thereby declared "that such portion of the company's capital as consists of 5*l.* per share remaining uncalled upon all the ordinary shares of the company shall not be capable of being called up, except in the event of and for the purpose of the company being wound up in accordance with the provisions of the Companies Act, 1879."

In June, 1894, it was resolved by the directors to create and issue debentures for 50,000*l.*, bearing interest at 6*l.* per cent.; and in accordance with this resolution, 160 debentures for 100*l.* each, bearing interest at 6*l.* per cent., were created and issued under the seal of the company. By these debentures the company bound itself to pay the principal moneys and interest secured by them, and the company as beneficial owners charged with such payments "its undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being."

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(1) Sect. 5 of the Companies Act, 1879, is as follows:—

"5. An unlimited company may, by the resolution passed by the members when assenting to registration as a limited company under the Companies Acts, 1862 to 1879, and for the purpose of such registration or otherwise, increase the nominal amount of its capital by increasing the nominal amount of each of its shares.

"Provided always, that no part of such increased capital shall be capable of being called up, except in the event of and for the purposes of the company being wound up.

"And, in cases where no such increase of nominal capital may be resolved upon, an unlimited company may, by such resolution as aforesaid, provide that a portion of its uncalled capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up."

"A limited company may by a special resolution declare that any portion of its capital which has not been already called up shall not be capable of being called up, except in the event of and for the purpose of the company being wound up; and thereupon such portion of capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up."

At the time these debentures were issued 4*l.* 5*s.* per share had been called up, and 5*l.* 15*s.* per share remained uncalled up.

On August 8, 1896, an action was brought against the company by a debenture-holder suing on behalf of himself and all other the debenture-holders of the company, and on August 18, 1896, he obtained judgment in the usual form, and a receiver was appointed in the action. On the same day (August 18) the company was ordered to be wound up, and a liquidator was appointed. Meanwhile, out of the 5*l.* 15*s.* per share above referred to as uncalled up when the debentures were issued, 15*s.* per share had been called up by the directors; so that, at the date of the winding-up, the 5*l.* per share, which constituted the capital reserved by the resolution, alone remained uncalled up. This 5*l.* per share the liquidator had since called upon the contributories to pay, and as the assets of the company, including it, were insufficient to pay the costs of the winding-up and the creditors of the company, the question arose whether or not the debentures created a valid first charge upon the 5*l.* per share reserved capital, so as to entitle the holders of them to payment out of that fund in priority to the other creditors and the costs of the winding-up.

In November, 1897, the plaintiff in the debenture-holder's action applied by summons that this question might be determined, and this summons was adjourned into court, and was heard by Wright J. on December 9 and 10, 1897.

R. F. Norton (*Swinfen Eady, Q.C.*, with him), for the applicant. It will be contended that the effect of s. 5 of the Companies Act, 1879, is to prevent the uncalled reserve capital from being charged, and that it is to be kept intact for the benefit of the unsecured creditors. But the Act does not say that. It only says the reserve capital "shall not be capable of being called up, except in the event of and for the purposes of the company being wound up." The event of winding-up has happened, and one of the purposes of the winding-up is to pay the company's debts, including the secured debts. There has been no decision on the section, but there is a dictum of Lindley L.J. in *In re Pyle Works.* (1) That dictum is discussed and disapproved of in 1 Palmer's Company Precedents, 6th ed. p. 643. The decision in *In re Pyle Works* (1), but not the dictum, was approved of by the Privy Council in *Newton* v. *Anglo-Australian Investment, Finance and Land Co.* (2), and the observations of Lord Macnaghten in that case are in my favour. The only result of the Act is that the reserve capital is to be called up in the winding-up, and to be applied in paying the creditors, including those who have a charge upon it.

Farwell, Q.C., and *George Henderson*, for the liquidator. The only possible object of the Act was to create a reserve liability—to preserve the calls intact for the purposes of the winding-up free from the effect of any intended charge. Before the Act a company could by its articles of association create capital to be called up only in case of winding up, but such a provision could be altered: *Malleson* v. *National Insurance and Guarantee Corporation.* (3) The Act of 1879 provided in effect that where such a provision was made it should be unalterable. In the case in the Privy Council no statutory provision was in question. In *In re Pyle Works* (1) what Lindley L.J. said was a decision, and not merely a dictum.

Norton, in reply.

Wright J. The question is, What is the proper construction of s. 5 of the Companies Act, 1879, which says that "a limited company may by a special resolution declare that any portion of its capital which has not been already called up shall not be capable of being called up, except in the event of and for the purpose of the company being wound up; and thereupon such portion of capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up"? A special resolution under that section was passed by the defendant company in 1892. Debentures in the ordinary form, but expressly extending to uncalled capital, were issued in 1894; and now the question arises, the company being

(1) 44 Ch. D. 534, 586.

(2) [1895] A. C. 244.

(3) [1894] 1 Ch. 200.

in liquidation, whether the rights of the debenture-holders extend to the capital mentioned in the special resolution passed under the powers of the Act. It seems to me that, looking to the language of the section, one ought to come to the conclusion that the section means what it primâ facie says, namely, that after such a resolution has been passed there is a statutory inability on the part of the company to call up further capital for any other purpose than the purpose of the company being wound up. I accept Mr. Farwell's suggestion that that means that the very object of the Act is to preserve intact for the general creditors or for the purpose of a liquidation the amount of that uncalled capital. It seems to me that on this section there is hardly room for doubt. That construction is fortified by a very high authority, the dictum—if it be a dictum, but I think it is more than a dictum—of Lindley L.J. in *In re Pyle Works*. (1) At first sight the opinion of the Privy Council in *Newton* v. *Anglo-Australian Investment, Finance and Land Co.* (2) seems to raise some difficulty; but, on looking carefully at that case, I do not think it touches this one at all. The principal points in that case are not in question here. The subsidiary point there discussed was what was the effect of articles of association which did not deal with winding-up at all, but provided that the company should not call up more than 5*l.* per share, unless it determined by special resolution that the paid-up capital was insufficient to meet its liabilities. It is quite obvious that that does not necessarily involve a winding-up. I do not think the question arose there which arises here. Even if it did, there the articles of association on which the matter depended were part of a friendly arrangement between the shareholders, and the case is not like this, where there is a statutory enactment absolutely disabling the company from dealing with the funds except for a particular purpose. I hold, therefore, that the debenture-holders are not entitled to a first charge on the reserve capital.

F. E.

C. A. The plaintiff in the debenture-holder's action appealed. The appeal was heard on March 24, 1898.

(1) 44 Ch. D. 534.

(2) [1895] A. C. 244.

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Swinfen Eady, Q.C., and *R. F. Norton*, for the appellant. This company under its articles of association was expressly empowered to charge its uncalled capital; and consequently a mortgage or charge by the company of its uncalled capital in favour of particular persons is valid as against, and confers priority over, the ordinary creditors of the company in a winding-up: *In re Pyle Works* (1); *In re Phœnix Bessemer Steel Co.* (2); *Newton* v. *Anglo-Australian Investment, Finance and Land Co.* (3) Coming to the Act of 1879, the portion of the uncalled capital which, in pursuance of the resolution passed under s. 5 of that Act, was only to be called up in the event and for the purposes of the winding-up is still part of the capital of the company in the full sense of the word. There is nothing in the Act which either expressly or by necessary implication prohibits a company from charging its uncalled capital, including that part of it which has been reserved by a resolution with the payment of particular debts; and in the absence of such prohibition the power to charge it necessarily follows. It is true that under the 5th section of the Act the reserved capital "shall not be capable of being called up, except in the event of and for the purposes of the company being wound up." But here the company is being wound up, and the payment of the debts of the company secured by the debentures is as much "one of the purposes of the company being wound up" as the payment of its other debts is. The uncalled capital of a company is very often its most valuable asset, and may be the only thing it can have recourse to on a pinch; and to deprive a company of the means of obtaining relief from temporary pressure by borrowing money upon the security of its (perhaps) only valuable asset might lead to the ruin of the company.

Farwell, Q.C., and *George Henderson*, for the respondent. The construction put upon s. 5 of the Act of 1879 by the appellant would reduce it to a nullity. The Act of 1879 "to amend the law with respect to the liability of members of banking and other joint stock companies" was passed shortly

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(1) 44 Ch. D. 534.

(2) (1875) 44 L. J. (Ch.) 683.

(3) [1895] A. C. 244.

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after the failure of the Glasgow Bank (amongst other things) to enable members of an unlimited company to get the benefit of limited liability, and the object of the fourth clause of s. 5 was to enable a limited company to create an inalienable fund to which its ordinary creditors might look in the event of a winding-up; and it is for their benefit and for that of the company that there should be an asset which cannot be touched, and upon the existence of which free from any charge the ordinary creditors can rely. The mortgagees of the company and their rights are outside the liquidation: *In re David Lloyd & Co.* (1); and although the debenture-holders may receive their debts through the machinery of the winding-up, the payment of such debts is in no sense one of the purposes of the winding-up.

Swinfen Eady, Q.C., in reply.

[In other respects the arguments were similar to those addressed to the Court below, and the following additional authorities were referred to: *In re Henry Pound, Son & Hutchins* (2); *Welton* v. *Saffery* (3); *In re Borough of Portsmouth Tramways Co.* (4); *In re Great Western (Forest of Dean) Coal Consumers' Co.* (5); *Moor* v. *Anglo-Italian Bank* (6); *Lock* v. *Queensland Investment and Land Mortgage Co.* (7)]

Cur. adv. vult.

April 1. LINDLEY M.R. The question in this case is a very important one, and turns on the true construction of s. 5 of the Companies Act, 1879. [His Lordship then stated the facts of the case, and after reading s. 5 of the Companies Act, 1879, and referring to ss. 4, 6, and 10 of the same Act as being instructive, continued:—]

The contention on the part of the appellant is that a limited company can validly charge its uncalled capital if authorized so to do by its memorandum of association or by its articles; and that the capital or money which under the Act of 1879 can only be called up in the event of and for the purposes of the company being wound up is part of the capital of the company in the full and proper sense of that word; and that, there being no prohibition against creating charges upon it, the power to create such charges necessarily follows. This argument is based on *In re Pyle Works* (1), which finally settled that uncalled capital of a limited company governed by the Companies Act, 1862, could be validly charged in favour of particular persons.

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(1) (1877) 6 Ch. D. 339.
(2) (1889) 42 Ch. D. 402.
(3) [1897] A. C. 299.
(4) [1892] 2 Ch. 362.
(5) (1882) 21 Ch. D. 769.
(6) (1879) 10 Ch. D. 681.
(7) [1896] 1 Ch. 397; [1896] A. C. 461.

It is further contended that the payment of the secured debts of a company is as much a purpose of the company as the payment of its other debts; that there is no necessary implication requiring the Court to hold reserve capital to be incapable of being charged with the payment of particular debts; and that it may be ruinous to a company to prevent it from obtaining relief from perhaps temporary pressure by raising money on the security of its most valuable asset.

Cogent as this argument is, I am convinced that it is unsound, and that to yield to it would defeat and not carry out the purpose with which the Act of 1879 was passed.

When *In re Pyle Works* (1) was decided I foresaw that the decision might be pressed further than I was prepared to go, and I pointed out that, in my opinion, it did not authorize mortgages of reserve capital formed under the Act of 1879. I adhere to that view now that I have carefully reconsidered it.

In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon's Case* (2) to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief. The Companies Act, 1879, was passed in order to remedy some defects in the law relating to unlimited companies, which defects, although long known to lawyers, startled the public when the City of Glasgow Bank stopped payment in 1878. The members of unlimited companies were in this position. First, they were liable to calls on their shares to their nominal amounts. This was the only liability which

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(1) 44 Ch. D. 534.

(2) (1584) 3 Rep. 7 a.

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could be enforced by the company or by its directors whilst the company was carrying on business. This liability, but no liability beyond, was an asset of the company with which the company could deal. But, secondly, in addition to this limited liability, the members were under an unlimited liability to the creditors of the company; and this unlimited liability could be enforced by creditors, although it was not an asset of the company which the company or its directors could charge, alien, or dispose of in any way whatever to the prejudice of any creditor. What was wanted was power to form a company with a reserve capital which should be limited in amount, which should be available for creditors in the event of a winding-up, and which should not be under the control of the directors any more than the funds were which the creditors could obtain, but the directors could not under the old law. This amendment in the law was made by the Act of 1879.

It appears to me plain that s. 5 was framed with a double object—namely, first, to preserve for the general creditors of the company the funds which the members were liable to pay, but which the directors could not call up; and, secondly, to enable the members to limit the amount of their liability on a winding-up to pay the creditors more than the amount preserved for them. Now, if the appellant's contention is right, the first of these objects will be entirely defeated, although there is not a sign of any intention on the part of the Legislature to effect so great a change in the law, and although such a change would or might be ruinous to the great body of a company's creditors and be destructive of the credit which the preservation intact of reserve capital gives to those companies which avail themselves of the Act of 1879. To effect such a change in the law applicable to unlimited companies which avail themselves of the Act of 1879, some provision is wanted to confer on companies carrying on business power to deal with what the members are only liable to pay when the winding-up takes place. Such a power would be a complete novelty, and cannot be inferred from the absence of any words prohibiting it.

I have dwelt on the effect of the Act of 1879 on unlimited companies, which take the benefit of it, because the effect on them and the effect on limited companies are to be gathered from the use of exactly similar language. It was obviously desirable to enable companies originally formed and registered as limited companies to have reserve capitals, and not to confine that advantage to unlimited companies registering themselves as limited companies. The object of the last part of the section is exactly the same as the object of the first part. Both classes of companies are put on the same footing so far as reserve capital is concerned. The prohibition against calling up the reserve capital in the case of limited companies is inserted for precisely the same purpose as in the case of unlimited companies, namely, to preserve such capital for the general purposes of the company when wound up. To interpret the section so as to enable a company to defeat this object by pledging or otherwise disposing of its reserve capital is, in my opinion, entirely to miss the real meaning of the Legislature as expressed in the language it has used.

Neither the Act of 1879 nor the other Companies Acts give a company power to dispose of assets which cannot come into existence until it is wound up. To hand over the reserve capital or any part of it when called up to a prior assignee, or to a mortgagee who has no claim against the assets until he has realized or given up his security, is not to apply the reserve capital for the purposes of the company being wound up within the true meaning of that expression as used in s. 5, but to prevent such application. This was the view of Wright J., and it is mine also. With respect to the case of *Newton* v. *Anglo-Australian Investment, Finance and Land Co.* (1), on which counsel for the appellant so much relied, I need only observe that it was not a decision on the Act of 1879, but a decision on an article of association, so worded as not to preserve, nor indeed to shew any intention to preserve, the reserve capital for the benefit of the general creditors in the event of liquidation. I cannot regard that case as an authority against the view which I take of the Act of 1879. The appeal must be dismissed with costs.

(1) [1895] A. C. 244.

RIGBY L.J. I am of the same opinion, and for the same reasons. I do not think it necessary to add anything more.

VAUGHAN WILLIAMS L.J. I agree, and I prefer to express my own reasons.

The question in this case is whether capital rendered incapable by the Act of 1879 of being called up except in the event and for the purposes of a winding-up can be mortgaged by the directors.

It is not an essential characteristic of capital of companies formed under the Companies Act, 1862, that it should be capable of being mortgaged by the company.

All that was decided in *In re Pyle Works* (1) was that, there being in the articles of that company a power of mortgage wide enough to include uncalled capital, there was nothing in the nature of uncalled capital as constituted by the Companies Act, 1862, to prohibit, either by express words or by necessary implication, the mortgaging of such capital, and that the article, therefore, was operative and not ultra vires.

The question, therefore, in this case is not whether capital rendered incapable of being called up by the Act of 1879 is capital within the meaning of the Companies Act, 1862, but whether, being such capital, there is anything in the Act of 1879 which expressly or by necessary implication renders such capital incapable of being mortgaged.

This question depends on the true construction of the words of the Act.

Sect. 4 of the Act enacts that, "subject as in this Act mentioned, any company registered before or after the passing of this Act as an unlimited company may register under the Companies Acts, 1862 to 1879, as a limited company, or any company already registered as a limited company may re-register under the provisions of this Act. The registration of an unlimited company as a limited company in pursuance of this Act shall not affect or prejudice any debts, liabilities, obligations, or contracts incurred or entered into by, to, with, or on behalf of such company prior to registration, and such debts, liabilities, contracts, and obligations may be enforced in manner provided by Part VII. of the Companies Act, 1862, in the case of a company registering in pursuance of that part."

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(1) 44 Ch. D. 534.

It will be observed that this section, excepting in so far as it provides that the registration of an unlimited company as a "limited company" in pursuance of this Act shall not affect or prejudice any debts or liabilities incurred prior to registration, does not impose any condition of registration.

Then comes s. 5. [His Lordship then read the first three paragraphs of that section, and continued :—]

Thus, the first three paragraphs of this section relate solely to "unlimited companies" registering as "limited companies."

The first paragraph provides that the "unlimited company" may by the resolution assenting to registration increase the nominal amount of its capital by increasing the nominal amount of each of its shares; and the second paragraph provides that no part of such increased capital shall be capable of being called up, except in the event of, and for the purposes of the company being wound up.

The third paragraph provides that, in cases where no such increase of nominal capital may be resolved upon, an "unlimited company" by the resolution assenting to registration as a limited company may provide that a portion of its uncalled capital shall not be capable of being called up except in the event of and for the purpose of the company being wound up. It will be observed that the condition in paragraph 2 is a condition of the increase of capital, and not a condition of registration as a "limited company."

The statutory condition is of course irrevocable, and the resolution to the same effect in paragraph 3 seems equally irrevocable, as being a condition of the constitution of the company as a "limited company."

If one may speculate on the intention of the Legislature in creating this condition of the increase of its nominal capital on the registration of an "unlimited company" as a "limited company," and in empowering the "unlimited company" on registration as a "limited company" to provide that a portion of its uncalled capital shall be subject to a similar condition to that contained in the proviso, it would seem to be that, whereas the "unlimited company" while it existed as such afforded to its creditors in the "unlimited liability" of its members a fund for the satisfaction of their claims, outside and beyond the nominal amount of its capital (as defined by the nominal amount of each of its shares), which fund was not available for the company in the conduct of its business or in any way at the disposal of the company, the Legislature seems to have intended to empower the company as a "limited company" to appropriate a portion of its capital to the creation of a fund which should be limited to the same purposes—that is to say, which, while available for the satisfaction of creditors, should not be available for the company in the conduct of its business, or in any way at the disposal of the company.

I do not think, however, that the Legislature by the provisions in these paragraphs had in view the protection or security of the creditors.

If the Legislature had so intended, it would have made the appropriation of a portion of the capital to such a purpose a condition of registration under this Act. I think the view of the Legislature was to enable the company on registration to improve its credit, by affording to its creditors, to a limited extent, a security somewhat of the character which the company whilst unlimited afforded to them.

Now, the primary object of the Act of 1879 being to enable an "unlimited company" to convert itself into a "limited company," and the Legislature having thought fit to enable the "unlimited company," at the time of its conversion, to maintain or improve its credit by the appropriation of a portion of its capital as a reserve of this character, the Legislature seems to mean by s. 5 to extend this power or privilege to companies which were originally registered as limited companies under the Act of 1862.

The fourth paragraph runs thus: "A limited company may by a special resolution declare that any portion of its capital which has not been already called up shall not be capable of being called up, except in the event of and for the purpose of the company being wound up; and thereupon such portion of capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up."

It will be observed that the final words of this paragraph give a statutory effect to the resolution when passed.

The effect of this would seem to be to make the resolution irrevocable.

Apart from this section, I doubt whether a resolution providing that a portion of the capital of a "limited company" should not be capable of being called up, except in the event of and for the purposes of the company being wound up, could have been effectively passed by the company even in the shape of a resolution altering the articles, unless the memorandum of association in general or specific terms authorized the passing of such a resolution. But I gather from the observations of Lord Herschell in *Ooregum Gold Mining Co. of India, Limited* v. *Roper* (1) that such a resolution might validly be passed if authorized generally or specifically by the "memorandum of association."

It may be that such a resolution passed by the company independently of the memorandum of association, and independently of the statute, would have been revocable excepting so far as acted on, and would have merely limited the control of the company over this portion of the capital in respect of "calls," and would have left the power of mortgaging untouched. But the effect of a resolution passed under the memorandum of association or the statute is certainly to render the resolution irrevocable, and to make it as much a part of the constitution of the company as if a clause to the effect of the resolution had been validly introduced into the memorandum of association.

Now, supposing such a clause to have been validly introduced into the memorandum of association, what would have been the effect of such a clause in the memorandum on this portion of the capital?

I am not speaking here of its effect as an alteration of the memorandum or constitution of the company authorized by this Act, because in such case its effect would undoubtedly (to

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(1) [1892] A. C. 125.

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my mind) be the same as the effect of the identical resolution authorized in this section, if passed by an unlimited company at the time of its conversion by this Act into a "limited company."

I am speaking of its effect as a valid clause in the memorandum of association (if such there could be) independently of some statute outside the Act of 1862.

Would not the effect of such a clause by necessary implication be to withdraw the portion of the capital of the company affected by it from the control of the company as "a going concern," and to convert it into a fund applicable only to the payment of debts in the event of a winding-up?

I think it would have this effect by negativing quâ this portion of the capital the implication of a power to mortgage, just as Knight Bruce and Turner L.JJ. held, in *Stanley's Case* (1), that the necessary discretion of the directors from time to time to make calls negatived the implication of a power to mortgage or assign uncalled capital. It is true that the inference of the Lords Justices must be taken to be overruled by *In re Pyle Works* (2); but the principle that you may negative such implication by an intent drawn from the terms of the memorandum is not overruled.

I agree with the contention of the appellants that the payment of secured creditors is a purpose of the winding-up, and I agree that this portion of capital is an asset of the company which has to be collected by the liquidator; but neither of these propositions seems to me to negative the appropriation of this portion of the assets to the exclusive purpose of the payment of debts, or at all events the appropriation of this portion of the assets to purposes exclusive of sale or mortgage by the company. It must be remembered that the Act of 1862 contains no express power to a company to sell or mortgage the whole or any part of its property, and that you must look at the memorandum of association to find whether there is by implication a power of sale or mortgage of its property and what part of property and whether there is any prohibition express or implied contained in it prohibiting sales or mortgages of the whole or any part of its property; and I think that a clause in the memorandum negativing the power to call up a portion of the capital except for the purpose of winding-up would by implication negative the power of the company to sell or mortgage such portion.

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(1) (1864) 4 D. J. & S. 407.

(2) 44 Ch. D. 534.

At all events, whatever may be the effect of a resolution passed independently of this statute, I think that a statutory resolution, passed under s. 5 of this Act, by implication negatives the implied power to mortgage the portion of capital affected by it, which would otherwise be inferred in respect of every portion of the capital of the company, and renders invalid, pro tanto, any mortgaging power given by the articles.

I wish to add that in the case of *Newton* v. *Anglo-Australian Investment, Finance and Land Co.* (1) the articles did not render the capital incapable of being called up except for the purpose of winding-up, but only unless a special resolution was passed by the company to the effect that the paid-up capital of the company had become insufficient to meet its liabilities, and that it was therefore necessary to call up the balance of the shares.

This article obviously left the whole capital at the disposal of the company.

Solicitors: *Munns & Longden; Mackrell, Maton, Godlee & Quincey.*

W. W. K.

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(1) [1895] A. C. 244.

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April 27, 28, 29.

FELL *v.* THE OFFICIAL TRUSTEE OF CHARITY LANDS.

[1895 F. 863.]

Churchwardens—Income of Charity Estates—Banking Account—Anticipation of Rents—Charge on Charitable Property—Charitable Trusts Amendment Act, 1855 (18 *&* 19 *Vict. c.* 124), *s.* 29.

Estates held on old parochial trusts, the origin of which was unknown, were in 1865 vested in trustees by a deed of appointment of new trustees upon trust to permit and suffer the churchwardens of St. B., in the City of London, to receive and take the rents as the same should from time to time grow due and be payable as formerly had been used, and for such charitable uses, intents, and purposes as the same had been usually employed by the parishioners of the said parish, whether in or about the repairs of the church, the relief of the poor of the parish, or any other of the public affairs of the parish. The churchwardens kept an account with a bank headed as the account of the churchwardens, not mentioning their names, and for many years this account had been kept as a continuous account, an adverse balance at the end of one year being paid out of rents of subsequent years. From 1885 to 1888 the then churchwardens, there being a temporary diminution of income, obtained from the bank, without the sanction of the Charity Commissioners, advances amounting to 3000*l.*, which were carried to the credit of the churchwardens in the account. In 1891 a scheme by the Charity Commissioners under the City of London Parochial Charities Act, 1883 (46 & 47 Vict. c. 36), came into effect, by which the estates were vested in the Official Trustee of Charity Lands, and the administration of the rents in the Trustees of the London Parochial Charities. The bank then sued the individual churchwardens in whose time the advances had been made for the advances; and the churchwardens brought an action against the Official Trustee of Charity Lands and the Trustees of the London Parochial Charities to be indemnified out of the rents against the claims of the bank:—

Held, by Romer J., that on the construction of the deed appointing new trustees, the churchwardens for the time being could only receive the rents as they became due and apply them, and had no power to anticipate the income so as to have a claim on the future income, and that their claim therefore failed:

Held, by the Court of Appeal, that whether this was a correct view or not the churchwardens' claim was defeated by the Charitable Trusts Amendment Act, 1855, s. 29, which prohibits any sale, mortgage, or charge of a charity estate without the approval of the Charity Commissioners.

THIS was an appeal by the plaintiffs, three former churchwardens of the parish of St. Botolph Without Aldersgate, from a decision of Romer J. dismissing with costs an originating summons against the Official Trustee of Charity Lands and the Trustees of the London Parochial Charities appointed by the City of London Parochial Charities Act, 1883 (46 & 47 Vict. c. 36).

Various lands had from ancient times been held upon trust for the parish of St. Botolph. No proper declaration of the trusts of any of them was in existence; but from time to time deeds appointing new trustees were executed containing a statement of the trusts on which the lands were held. The last of these was dated November 17, 1865, and by it the then last surviving trustee of the lands conveyed them to the use of himself and new trustees appointed by the vestry of St. Botolph in fee "upon trust and confidence nevertheless and to the intent that they the said [trustees] and the survivors and survivor of them, and the heirs of such survivor, their and his assigns, shall at all times hereafter convey, demise, lease, and dispose of the said hereditaments and premises to such person or persons and in such manner and form as the parishioners of the said parish of St. Botolph Without Aldersgate, assembled in vestry in order to treat and order the business and affairs of the said parish, shall from time to time order, direct, and appoint, and shall and do and for ever hereafter permit and suffer the churchwardens for the time being of the goods, chattels, rents, and ornaments of the church of the said parish from time to time and at all times hereafter to receive and take the rents, issues, and profits of the same hereditaments and premises as the same shall from time to time arise, grow due, and be payable, as formerly hath been used, and for such charitable uses, intents, and purposes as the same have been usually disposed of and employed by the parishioners of the said parish, whether in or about the repairs of the said church, the relief of the poor of the same parish, or any other of the public affairs of the same parish, and to and for no other use, trust, or purpose whatever."

The appellants were three former churchwardens of the parish. Fell was one of two churchwardens from May, 1884, to June, 1886. Rowley was one of two from June, 1886, to

May, 1888, and Ellis from May, 1887, to June, 1889. During the greater part of the above period the income of the trust property from temporary causes fell short, and the churchwardens for the time being obtained from a bank, with which they had an account headed "The Churchwardens of St. Botolph Without Aldersgate," advances to the amount of 3000*l.*, which were credited to the above account, and expended in the usual way for parochial purposes. The churchwardens obtained these advances in the expectation that they would be repaid out of the rents of subsequent years, the account having for many years been carried on as a continuous account in the same way as if the churchwardens had throughout been the same persons. These advances were—1000*l.* in October, 1885, when Fell and a person since deceased were churchwardens; 500*l.* in June, 1886, when Rowley and the same deceased gentleman were churchwardens; 500*l.* in August, 1887, when Rowley and Ellis were churchwardens; and 1000*l.* in March, 1888, when Rowley and Ellis were churchwardens. These advances were reduced to 2650*l.* by payments in 1887, 1888, and 1889, and all interest on them was paid up to December 31, 1891. They were obtained without any notice to the Charity Commissioners.

On February 23, 1891, a scheme under the City of London Parochial Charities Act, 1883 (46 & 47 Vict. c. 36), was approved by Her Majesty in Council for the management of these and other estates held on parochial trusts. By this scheme the lands were vested in the Official Trustee of Charity Lands to be administered and managed by the Trustees of the London Parochial Charities appointed by virtue of that Act.

In 1887 the churchwardens had obtained the sanction of the Charity Commissioners to their borrowing 5000*l.* for the purchase of some land connected with the trust estates, the loan being made repayable by instalments.

In 1892 the bank commenced an action against Fell to recover the first 1000*l.*, and an action against Rowley to recover the first 500*l.*, and in 1893 an action against Rowley and Ellis to recover the second 500*l.*, and in 1894 another action against them to recover the last 1000*l.*

Fell, Rowley, and Ellis, in June, 1895, took out an originating summons against the Official Trustee of Charity Lands and the Trustees of the London Parochial Charities, asking whether the defendants, in whom the parish estates and funds were now vested, ought not out of the said estates and funds to discharge the above claims made upon the plaintiffs respectively by the bank, and that the defendants might be directed to pay to the bank all moneys properly payable to them in respect of the above advances.

Romer J., on November 4, 1897, dismissed the application with costs, holding that under the deed of November, 1865, the churchwardens had no right but to receive the rents as they became due and payable, and apply them to the purposes specified in the deed, and that they had no power to charge the trust estate, or to anticipate the income so as to have a claim against future income, and had therefore no claim against income which accrued after the estates had been vested in the official trustee.

The plaintiffs appealed.

Neville, Q.C., *Arthur Powell*, and *P. F. S. Stokes*, for the appeal. In London, though not elsewhere, churchwardens are a corporate body for the purpose of holding land: Pulling, Laws and Customs of London, 262; Phillimore's Ecclesiastical Law, 1481. The account which they kept with the bank was therefore a continuing account. The judge below decided against the plaintiffs on the construction of the deed of November 17, 1865, and held that on the construction of it the churchwardens had no duty but to receive the rents for the year and apply them for the purposes of the year, and that if at the end of the year the balance was against them they must bear the loss. This, we contend, is erroneous. If at the end of the year the balance is against them, it ought to be paid out of the accruing rents, and this had been the practice in the administration of this trust from time immemorial. The deed of 1865 recognises this by directing the rents to be applied as they usually have been. Now, from time immemorial down to 1891 the churchwardens of the parish have, under the various trust deeds and in accordance with the custom of the parish, been, during their terms of office, trustees for the parishioners of the parish estates; and in that capacity they have, for the necessities of the parish and with the sanction of the parishioners, borrowed money beyond what they had in hand in one year upon the security of future payments. In no other way could the business of the parish have been carried on, and there is nothing in the trust deed forbidding them to recover from the next year the money they have had to spend beyond the income of the past year. The whole of the money which the appellants borrowed from the bank was obtained and applied for parish purposes, and the result has been that the income of the parish has greatly increased. It is true that the loan was obtained without the approval of the Charity Commissioners; but that approval was not necessary. The transaction was not a "sale, mortgage, or charge" within the meaning of the Charitable Trusts Amendment Act, 1855, s. 29. The appellants could have got a charge from a court of competent jurisdiction without the Charity Commissioners, and they are entitled to be indemnified out of the parish funds, including the future income, for the expenses incurred in the execution of their trust.

Vaughan Hawkins (with him *Sir R. Webster, A.-G.*), for the respondent the Official Trustee of Charity Lands. These parish estates are charity property: *Attorney-General* v. *Webster* (1), and if any custom to borrow upon them could have been proved to exist while they were the private property of the parishioners, that would afford no reason for holding that money could be borrowed upon them now. Evidence of custom is accordingly immaterial; the property must be dealt with as charity property, and its income must not be misapplied or anticipated. The City of London Parochial Charities Act, 1883 (46 & 47 Vict. c. 36), was passed in order to make provision for the better application and management of parochial charities, and a scheme for the management of this particular charity was prepared and approved under that Act, and came into operation in 1891. Whatever, therefore, was the custom in former days, it cannot be gone into now. The churchwardens are not entitled to be reimbursed out of future income expenses or loans incurred in previous years. They are not trustees with the rights of ordinary trustees as to reimbursement and indemnity. The churchwardens during each year are trustees in respect of that year only; and knowing, as they must have done, that they have the incomings of that year and no more to depend upon, they are not entitled to be reimbursed out of future income expenses contracted during a past year, or to contract loans for the purpose of defraying such expenses, and to charge the property with them, without the sanction of the Charity Commissioners. The decision of Romer J. was perfectly right.

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(1) (1875) L. R. 20 Eq. 483.

[They also referred to *Collinson* v. *Lister*. (1)]

Farwell, Q.C., and *Reginald Neville*, for the Trustees of the London Parochial Charities. The right of a trustee to be indemnified for money expended by him upon the preservation of the trust fund is strictly limited to the amount of the fund of which he is trustee: *In re Earl of Winchilsea's Policy Trusts*. (2) The trust fund here is the income of the trustees' year of office, and the appellants' only right is to be indemnified out of the income of the particular year of office for the expenses of that year. They have not, nor can they create, a lien or charge upon the future income or upon the corpus of the property.

[COLLINS L.J. referred to *French* v. *Dear*. (3)]

That is in our favour; and it was held in *Lanchester* v. *Thompson* (4) that no sale could legally be made to reimburse a former churchwarden for moneys laid out whilst in office; and in *Moss* v. *Thornley* (5), that the late churchwardens had no lien for any of the expenses they had incurred by virtue of their office upon church books which were the property of their successors.

There is no case of a subsequent sanction of an unauthorized borrowing by churchwardens; and by s. 29 of the Act of 1855, no charity trustees can charge the charity estate otherwise than with the authority of Parliament, or of a judge of competent

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(1) (1855) 7 D. M. & G. 634.
(2) (1888) 39 Ch. D. 168.
(3) (1800) 5 Ves. 547.
(4) (1820) 5 Madd. 4.
(5) (1856) 4 W. R. 514.

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jurisdiction, or according to a scheme, or with the approval of the Charity Commissioners.

W. W. K.

Powell, in reply. Churchwardens can bind their successors: *Martin* v. *Nutkin.* (1)

[*R. Neville. Furnivall* v. *Coombes* (2) lays down the contrary.]

They were in the position of trustees; and where a trustee pays money for the benefit of the cestui que trust, he is entitled to be indemnified: *Balsh* v. *Hyham.* (3) The lien of the churchwardens for an overdraft is not a "mortgage or charge of the charity estate" within the meaning of the Charitable Trusts Amendment Act, 1855.

[*Evelin's Case* (4) was also referred to.]

LINDLEY M.R. This is an appeal by some former churchwardens of St. Botolph Without Aldersgate, in the City of London, from an order refusing the relief sought by an originating summons, by which they asked whether the defendants, the Official Trustee of Charity Lands and the Trustees of the London Parochial Charities, ought not, out of the estates and funds which are vested in them and which previously belonged to the parish of St. Botolph, to pay and discharge the claims made upon the plaintiffs respectively by the London and County Banking Company in respect of moneys borrowed, amounting to 3000*l.*, which were advanced by the banking company at several times and credited to the account of the churchwardens of the parish for the purpose of the parochial trust, and were, as the plaintiffs allege, duly applied by the churchwardens in the administration of the same trusts.

The case came before Romer J., and he made no order on the summons, except that the plaintiffs should pay the costs. The question is one of some difficulty, and certainly of some importance, and of considerable interest from more points of view than one.

The first point we have to consider is who the plaintiffs are and what their duties were. It appears that each of these three gentlemen was one of the two churchwardens for the time being of the parish of St. Botolph in one of the years in which the advances were made, and that the parish of St. Botolph was entitled to property vested in certain trustees by a deed of trust dated November 17, 1865, which had been preceded by similar deeds for the last 200 years. The trusts declared by that deed are important. [His Lordship read the trusts.]

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(1) (1724) 2 P. Wms. 266.
(2) (1843) 5 Man. & G. 736.
(3) (1728) 2 P. Wms. 453.
(4) (1639) W. Jones, 439.

Pausing there for a moment, let us see what that means. In the first place, let us take the trustees of the estates, and consider what their duties were. All they had to do was to convey, demise, lease, and dispose of this property as the vestry should direct, and to permit the churchwardens to receive the rents. So far as the estate trustees were concerned, when they had paid or allowed the churchwardens for the time being to receive the rents, they had performed their duty, and were not concerned to see what the churchwardens did with them. I pass to the trustees of the rents. The trustees of the rents were the churchwardens of the parish. Churchwardens, even in the City of London, are officers elected year by year. It is said they are a corporation. There is an ambiguity about that. I do not myself think that it is made out by the custom of London, or by any Act of Parliament or otherwise, that they are a corporation in the full sense of the word. They are in the City a corporation for the purpose of holding land and for the purpose of the devolution of property, but I am not aware that they are a corporation in the sense that they are a corporate entity—that is to say, a person in point of law—nor that they can sue or be sued by any corporate name. There is authority that they cannot so sue or be sued, and I am not aware that they are a corporation except in the very modified sense to which I have alluded.

So far as this case is concerned, it is most important to bear in mind that these intermediate trustees, the churchwardens, are annual officers, elected by the parishioners, and that they hold office for a year. Now of what, in respect to this property, are those annual officers trustees? They are technically, I apprehend, trustees only of the annual receipts which it is their duty to receive and take under this trust deed. But it does not follow, to my mind, that it is impossible to look beyond them. The deed is really a piece of machinery for creating a trust of this property for the benefit of the parish; and when we consider the language of this trust, which is, that these rents are to be applied by the churchwardens as officers for the purposes of the parish, I am not myself satisfied that I should be prepared without further consideration to decide this case against the plaintiffs simply upon the ground that it was the duty of the churchwardens to look for their indemnity to the actual income only which accrued due during their year of office. I think that would be attaching too much importance to the machinery and too little to the real object of the deed; and if we found, as I think there is, a great deal of evidence to shew that it was customary for the churchwardens in old times to spend for the purposes of the trusts more money than they received in any particular year, and to recoup themselves out of the rents received in subsequent years, I should pause before I went the length of saying that, under the trusts declared by the deed, their doing so was illegal or improper. If it were not for the modern Acts of Parliament, I am not prepared to go the length of saying that the trustees of the rents would not be entitled to be recouped such outlays as they might have made properly in the execution of their trusts. I do not go so far as to say that I differ with Romer J. If it were not for the words in the trust which allude to past practice, I should think Romer J. was clearly right; but having regard to those words, if the case turned on the deed alone, I should not take his view without further considering the matter.

The modern Acts of Parliament, however, appear to me conclusive on the question; and if we were to sanction the view adopted by the appellants and to give effect to the extremely able argument of Mr. Powell, I think we should be doing the very thing which the modern Acts of Parliament have endeavoured to prevent. That this was a charitable trust is obvious, and the contrary could not be argued after the case of *Attorney-General* v. *Webster* (1), and on this particular deed I do not think any doubt could be raised about it. Before any of this money was borrowed, the London Parochial Charities Act, 1883, was passed. That was an Act passed for the purpose of reorganizing and consolidating all the London Parochial Charities, partly because the revenues of those charities had been, I do not say applied malâ fide or misapplied, but recklessly applied and badly managed—at least Parliament thought so—and so in 1883 this Act was passed. Speaking generally, it was to be carried into effect by schemes, and when a scheme was made respecting any particular parish then the parochial charity funds were to vest in an official trustee. Of course all that was known to the gentlemen who had the management of this charity. The scheme itself affecting this charity did not come into force until February, 1891. Now, in the interval in the years 1885, 1886, 1887, and 1888, what did the churchwardens, who were trustees of the rents of this property, do? They found that, owing to leases falling in and inability to create new leases without some loss of income to the trustees during the first year or two, their income, which was considerable, had been materially diminished. What do they do? Without consulting anybody, except the vestry, they borrow money to the extent of 3000*l.*, knowing perfectly well of the Act of Parliament which I have mentioned, and knowing perfectly well that a scheme was coming, and they spend this 3000*l.* for parochial purposes. They then come to the Court and ask it to declare them entitled to be indemnified. Out of what? Out of the future income of this charity. I pause there for a moment to consider what right they have to expect anything of the kind. Under the 29th section of the Charitable Trusts Amendment Act, 1855, it is quite obvious that they could not themselves, without the consent of the Charity Commissioners, have created any mortgage or charge upon these trust estates. We must assume that they knew this. What do they do? They say in effect, "We will not ask the Charity Commissioners anything about it, but we will spend money on what we think is beneficial to the charity; we will take the chance of the Court saying it is a proper expenditure, and then we will ask the Court to declare in our favour that we are entitled to a charge on the estate." Let us consider that a little more closely. If it can be done, it appears to me, I confess, to be not only evading the 29th section of the Act of 1855, but depriving the charity of the very protection which Parliament was anxious to throw over charities. I quite agree that the actual words of the Act, "It shall not be lawful for . . trustees . . . to make or grant, otherwise than with the express authority of Parliament" [or of the Court, or the sanction of the Charity Commissioners] "any sale, mortgage, or charge . . ." are not the aptest words to cover a transaction of this kind; and I do not suppose that a transaction of this kind was thought of. If it had been, I dare say it could have been hit with more apt words; but it would be an extremely narrow construction to say that such an operation as this is not hit by the words as they stand. To draw a distinction between making a charge and doing that which necessarily involves a charge is too subtle. Whether I sign a piece of paper and so create a charge, or whether I do an act which creates a charge, appears to me to be immaterial as regards this prohibition.

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(1) L. R. 20 Eq. 483.

If it is true that these gentlemen by laying out their own money, or borrowing money and expending it for the purposes of the parish, thereby obtain an equitable lien or charge upon the property, which I should have thought was the true view upon ordinary principles of equity, then it strikes me that they are distinctly struck at by s. 29, and I do not think we are forcing the language of that section at all by saying that this cannot be done and that they have not a charge. Mr. Powell, who saw the force of that, dealt with it very skilfully. He says, "I admit I have not a charge." If he has not a charge, how is he to get on? If he comes to us and asks us for a charge, I say, No; it would be wrong to give him anything of the sort. Why? Because, knowing of this Act of Parliament of 1883, these gentlemen have been doing the best they could to spend the money in a way which they probably saw would not be sanctioned. If it is a matter of discretion, the Court ought not to assist them to defeat the Act. If they claim a lien as a matter of right, they are hit by s. 29.

It appears to me that Romer J. is right in the result at which he has arrived, and that the appeal ought to be dismissed with costs.

RIGBY L.J. I am of the same opinion. First, with regard to the mere question of construction, I am far from saying that the conclusion arrived at by Romer J. may not be the right conclusion on the construction of the deed; but if that were the only point, I think I should require further time and a little more investigation. It is not clear to my mind that the churchwardens are in the position of annual trustees. It rather seems open upon the construction of the deed to say that they are mere officers of the vestry. They are churchwardens, and they are to act as such; and that being so, having regard to the words of reference, I have only to say that in this case I am glad to be free from the necessity of determining the question now raised merely upon the construction of the deed, as I think that the point, which rests upon the construction of the 29th section of the Charitable Trusts Amendment Act, 1855, enables me to deal with the case satisfactorily.

Now, what are the facts? The churchwardens, treating themselves as being trustees, which in a sense they undoubtedly were (whether in the full sense or not I am not quite prepared to say), of charity funds devoted to the purposes of the parish, borrow in four years four sums making altogether 3000*l.* from the London and County Banking Company, and they spend these moneys in a way in which I assume it was then competent for them to spend money in their hands arising from the charity estate. But I do not see that there is before us any sufficient evidence that the expenditure might not properly have been cut down so as to meet the circumstances of the year in which it took place, and that they were under any obligation to spend as much as they have done.

The question arises in this way. Mr. Neville, who has argued the case for the plaintiffs, was asked to point to a good instance, or one which he thought preferable, to try the point upon, and he selected a certain sum of money, namely, 343*l.*, which had been applied in payment of one annual instalment on account of principal and interest of a debt which had been properly incurred with the sanction of the Charity Commissioners in the year 1887. No doubt that was a proper borrowing of money, and the commissioners had stipulated that the principal and interest should be repaid by a certain number of annual instalments. It would be almost to my mind an absurdity that the commissioners should lay down a rule that this debt should be repaid by annual instalments, and that immediately, without any consent from them, the churchwardens or the vestry (I put them all together, because I assume that the churchwardens acted entirely under the authority of the vestry) might, when they thought fit, borrow again. If they could do so in one year, I do not see why they should not do it in every year; and the result would be that at the time when the commissioners had a right to suppose that the income of the charity was unincumbered they would find it subject to charges. I do not find that there is even a quasi necessity for borrowing money to pay that instalment of 343*l.* What they have to do, as it seems to me, is reasonably plain. The vestry and the churchwardens together, as the administrators of the trust, could have paid off this sum of 343*l.*, as they were in effect ordered to do by the Charity Commissioners, out of income, and they might have economised in other directions. That, I take it, was the plain intention of the Charity Commissioners when they made that order. They did not mean to say, "You may go on exactly as you did before, spending as much money as you did before." What they say in effect is, "You must set apart out of your income every year enough to pay the instalment for that year," the result being that, without further borrowing, they must economise. I can see no necessity, not even any moral necessity, for their continuing to spend at the rate that they did; and therefore, taking that item—which is a very fair item to take—I conceive that they ought not to have spent the income to such an extent as to disable them from paying this off, and that if the consent of the commissioners to the creation of such a charge as is now claimed was necessary, they ought not to have gone on without that consent.

That brings me, of course, to the construction of s. 29 of the Act of 1855. What is the principle of that section? I think no one can read it without seeing that it is not intended to remedy this or that sort of abuse that has arisen by the forestalment of charitable funds, but that it is a most general section. It prohibits sales, mortgages, and charges of charity property without such sanction as therein mentioned. No doubt the words "sale" and "mortgage" are special, but the word "charge" is a very general one. If the argument that there is a charge be given up—and it is said that there is an equity to have a charge made by the Court—I at once say if that is so I do not think the Court ought to exercise that power. I think that if there is not a charge the Court would not make one if it could, and I do not think it would have jurisdiction to make it.

If there is a charge, how did it come into existence? There was no writing or anything which could be read as saying, "I or we make a charge"; but unquestionably the churchwardens, when they borrowed and when they applied the money, intended to look to the future income of the charity to be recouped, and so far as they could make a charge they deliberately did so. The charge arose, if it arose at all, by virtue of their act, and I do not doubt it was their intention to create a charge; and if they did not think that what they did had the effect of making a charge, they would not have made themselves responsible at all. The transaction appears to me to be within the plain meaning of s. 29, and that is not a section from which we are at liberty to depart. There is no doubt about the mischief which the section was intended to remedy, and it would be a very strange thing to construe the Act as saying, "You may not make a charge in favour of any other person, but you may in favour of yourself." Suppose a trustee, having paid 500*l.* out of his own money for the purposes of the trust, says, "My intention is to treat this as a charge upon the property, and so far as I have power to do it I make a charge." That would be exactly in substance what the churchwardens here have done. I have no doubt that what they have done is within the mischief, and it is easily brought within the words, of the Charitable Trusts Amendment Act, 1855. I cannot suppose that the question whether they ought not to

Rigby L.J.

consult the Charity Commissioners had escaped their notice, because there was a recent borrowing with the sanction of the commissioners, and the churchwardens had to provide the annual instalment for repayment. But, however that may be, either through carelessness or a desire to avoid that supervision of the commissioners which it is the policy of the Charitable Trusts Act to enforce, I think that they took upon themselves the risk of being repaid or not; and even if we had jurisdiction to give them a charge which they have not, I do not think that it is a case in which we ought to exercise it, and for my own part I do not see that we have any such jurisdiction. I think it is reasonably plain that these trustees, like many other trustees all over the country, instead of adopting heartily the policy of the Act, set themselves to work to see how far they could minimise the operation of the Act, and how far they could continue to act upon their own judgment without waiting for the scheme or applying to the Charity Commissioners. If people approach an Act of Parliament in that spirit—which I think there is sufficient evidence that this vestry or these churchwardens did—they are not much to be pitied if it turns out that they have incurred liability by so doing.

Collins L.J. I am of the same opinion. I agree entirely with all that has been said about the section and the consequences to the appellants in this case.

With respect to the first point, namely, the construction of the deed, I must say that, speaking for myself, the inclination of my judgment would be to construe the deed as Romer J. construed it. We have heard a good deal upon the question of whether the churchwardens are to be regarded as a corporation or not. Now, the bearing of that upon this discussion, as far as I can understand it, appears to be this—that in construing this trust they are to be looked upon as a person, in fact as continuous, and that this throws a light on the true construction of the trusts, and suggests that they are not merely annual officers, but persons who have a right to deal with the corpus as well as the income of the property. It seems to me that they are treated in this trust as what they really are, namely, as persons who are churchwardens for the time being in the ordinary sense of the word.

In my judgment churchwardens are not a corporation. They are, as was said by Lord Kenyon in *Withnell* v. *Gartham* (1), which is a leading case on the matter, quasi a corporation for certain purposes, and in the City of London they are a corporation for the purpose of holding lands; but beyond that they are only annual officers, and I think this trust so treats them. It seems to me that their rights under this trust are to deal with the income during their term of office; and when I come to look at that part of the trust which is pressed as enlarging their right, namely, that part which refers to the ancient practice, it seems to me that the words there used point to the class of objects to which they were to apply the fund, and not to the mode in which they were to deal with it. It says that the churchwardens are to receive the rents "as the same shall from time to time arise, grow due, and be payable, as formerly hath been used, and for such charitable uses, intents, and purposes as the same have been usually disposed of and employed." That does not seem to me to point to the particular methods which they adopted in applying the fund to those objects, but merely to define the nature of the objects to which they might legitimately apply those funds, and they are simply dealt with as churchwardens in the ordinary sense, with no right to anticipate their income in any way.

Solicitor for appellants: *W. H. Court.*

Solicitor for official trustee: *J. M. Clabon.*

Solicitor for Trustees of London Parochial Charities: *Robert Pearce.*

H. C. J.

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(1) (1795) 6 T. R. 388, 396.

C. A.
1898
May 5, 6, 19.

In re DE NICOLS.
DE NICOLS *v.* CURLIER.

[1897 D. 968.]

Domicil—International Law—Marriage—Matrimonial Domicil—Change of Domicil—Movable Goods—French Law—Community of Goods.

A Frenchman and Frenchwoman married in France without any express marriage contract, so that according to French law their rights inter se as to property would be governed by the rule of communauté de biens. They came to England with a small amount of money, and became permanently domiciled there. The husband amassed a large fortune, and died in England, leaving his wife surviving, and having made an English will by which he disposed of all his property:—

Held, by Kekewich J., that as to movable goods the rights of the wife under the French marriage law as to communauté de biens were not affected by change of domicil, and that the widow was entitled to the share of her husband's personal estate to which she would have been entitled if they had remained domiciled in France.

Held, on appeal, that a change of domicil alters the rights of husband and wife as to unsettled movable property, and that as at the time of the husband's death the parties were domiciled in England, their rights were governed by English and not by French law, so that the whole of the husband's personal estate was effectually disposed of by his will.

Lashley v. *Hog*, (1804) 4 Pat. 581, considered and followed.

THIS was an appeal by the daughter of the testator, D. N. de Nicols, and her husband and children from a decision of Kekewich J. (1)

The testator and his wife, both of whom were French, were married in France in 1854. They entered into no express contract on their marriage, so, according to French law, their rights to property were governed by the law of communauté de biens. In 1863 they came to England, where they became permanently domiciled. Their whole property when they came over was only about 400*l.*; but the husband amassed a large fortune here. He died in 1897, leaving a will by which he gave his residuary estate to his executors and trustees upon trust for sale, and to hold the proceeds upon trust for his wife for life, and after her death upon trusts for his only daughter, her husband and children.

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(1) [1898] 1 Ch. 403.

The widow took out an originating summons to ascertain her rights and interests in the property of the testator by reason of their having while domiciled in France married there without any contract. The question formulated in chambers for decision was, "Did the change of domicil alter the legal position of the parties to the marriage in reference to property?" The argument was for the present confined to the effect of the change of domicil as to the personal property.

Kekewich J. made a declaration that the change of domicil by the spouses did not affect their respective rights under the French or matrimonial domicil in and to the movable property acquired by the spouses or either of them after such change.

The result of this was to make the widow entitled to half the testator's personal estate. The daughter and her husband and children appealed.

A. V. Dicey, Q.C., and *Whinney*, for the appellants. It cannot be disputed that the whole of the immovable property of the testator in England is governed by the English law; and we maintain that the whole of his movable goods are also governed by the English law, and are effectually dealt with in his will. There are English, Scottish, and American authorities in favour of our contention, and one of them in the House of Lords, namely, *Lashley* v. *Hog* (1), is very strongly in our favour, if not actually decisive. It is true that in *Lashley* v. *Hog* (1) there was an ante-nuptial contract; but Lord Eldon held that it did not apply to the property then in question. (2) The case is practically on all fours with the present case, only the circumstances are converse. There is a distinct difference between cases where there is and those where there is not a marriage settlement. Here there was none, and the whole of the judgment against which we appeal rests upon the supposition that an implied contract was made for the parties by the

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(1) 4 Pat. 581, 613, 614, 617; Appx. 414; 1 Burge, Col. and For. Robertson on Personal Succession, Law, 623–5; 1 Robert. 4.

(2) 4 Pat. 605.

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law of the country in which they were married. This is, however, contrary both to principle and to authority. Implication, if there were any, would not be enough. In the absence of express contract no tacit contract will preserve the law of the matrimonial domicil. The principle is that the right to property changes with the domicil, and where there is a change of domicil the law of the actual domicil, and not that of the matrimonial domicil, will govern as to all future acquisitions of movable property: 2 Fraser's Husband and Wife, 2nd ed. 1325; Robertson on Personal Succession, Appx. 414; 1 Burge's Colonial and Foreign Law, 626; *Foubert* v. *Turst* (1); *In re Lett's Trusts* (2); *Udny* v. *Udny* (3); *Bell* v. *Kennedy* (4); *Ewing* v. *Orr-Ewing* (5); *Hall's Trustees* v. *Hall* (6); *In re Marsland* (7); *In re Craignish.* (8) So much for the cases that have occurred in the United Kingdom; and the principle for which we are contending is also the accepted doctrine of all the best American authorities, which we submit will not be without weight.

[LINDLEY M.R. Upon a point like this we should certainly not disregard them as a guide in a difficult problem.]

The principle is broadly laid down in Story's Conflict of Laws (which may be regarded as an Anglo-American authority), 8th ed. ss. 186, 187, and is adopted in *Saul* v. *His Creditors* (9) and Field's International Code, 2nd ed. s. 576, p. 400: see also Wharton's Conflict of Laws, 2nd ed. s. 196, p. 279. The respondents rely upon the statement of the law in Westlake on Private International Law, 3rd ed. s. 36, pp. 68, 69; but we contend that the doctrine laid down by the learned writer in s. 36 does not apply to a case where there has been a change of domicil and property acquired thereafter, and that in his observations (p. 74) as to Lord Eldon's meaning in *Lashley* v. *Hog* (10) he has fallen into an error. They also rely on a

(1) (1703) 1 Bro. P. C. 2nd. ed. 129.

(2) (1881) 7 L. R. Ir. 132.

(3) (1869) L. R. 1 H. L., Sc. 441.

(4) (1868) Ibid. 307; S.C. 2 M. 587.

(5) (1885) 10 App. Cas. 453, 499.

(6) (1854) 16 D. 1057.

(7) (1886) 55 L. J. (Ch.) 581, 582.

(8) [1892] 3 Ch. 180.

(9) (1827) 16 American Decisions, 212, 228.

(10) 4 Pat. 581, 613, 614.

French case: *Boyer's Case.* (1) But cases decided in France do not carry the same weight upon questions of this kind as those decided in England or America, and although the tendency of Continental cases may be somewhat in favour of the law of the matrimonial domicil, the implied contract, which is the theoretical basis of the decision in the Court below, is repudiated both by Savigny (Savigny's Private International Law, by Guthrie, 2nd ed. s. 379, p. 293) and Bar (2 Bar's Priv. Inter. Law, p. 408). See also Sewell's Summary of French Law as affecting English Subjects.

An implied contract must be one of two things—(1.) a contract which the parties had in their minds but did not express; and it is impossible to suppose that this workman and his wife could have had in their minds a contract that if they changed their domicil still the law of the matrimonial domicil was to bind them. Or it must be (2.) such a contract or arrangement as reasonable persons would have introduced if they had thought of it, i.e., such as the persons who advocate the introduction now think would have been reasonable. But why should French law follow this husband and wife by implication as to movables and not as to immovables? Any attempt to apply the law of the matrimonial domicil to this case would lead to a result which could not have been contemplated by the Court, and which would break down in application. Suppose the testator had chosen to invest the whole of his property in land, every particle of it must have gone according to the law of England, and the husband might have left the whole of it to a stranger. So that the doctrine of the matrimonial domicil can neither be applied in toto nor upon fair principles. In *Kennedy* v. *Bell* (2) it was decided that the law of the domicil at the time of death governs the right to personal property. The House of Lords expressed no disagreement with this, but reversed the decision on an independent ground. (3) In *Lashley* v. *Hog* (4) the rights of a husband were held to be changed by a change of domicil. The Married Women's

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(1) Dalloz, Jurisprudence Générale Recueil Périodique, 1854, Pt. I. p. 61.

(2) (1864) 2 M. 587.

(3) L. R. 1 H. L., Sc. 307.

(4) 4 Pat. 581.

Property Act, 1882, puts a considerable difficulty in the way of the respondents. Suppose while Madame de Nicols and her husband were domiciled in England she became entitled to a large sum of money. By the Act she is entitled to it as her separate estate, but, if the decision appealed from is right, the husband could insist on the communauté de biens. To allow this the Act must be read, "every married woman who at the time of her marriage was domiciled in England."

[COLLINS L.J. May it not be read, "subject to all existing rights"?]

Rights of succession to personal property are indisputably governed by the law of the domicil at the death, and why should not rights of property? According to Lord Eldon, there is great difficulty in drawing a distinction between them. The only authority against us is the decision now appealed from. *Lashley* v. *Hog* (1) is a binding authority, and the decisions in the Scottish Courts have followed it. The judgment of Kekewich J. is based wholly upon what we submit to be a mistaken view, that there was between the parties a contract for the communauté de biens. In 4 Phillimore's International Law, 3rd ed. 352, the writer does not appear to have had fairly before his mind the cases on which we rely. The Scottish Courts treat the law as settled.

[RIGBY L.J. Have they ever taken away from the wife a right which she would have had if the domicil of marriage had continued? The change of domicil depends on the husband. It might be said that if the husband chooses to change his domicil to one which gives her greater rights, he is making her a present.]

They never take any such ground. In *Lashley* v. *Hog* (2) it appears that Mrs. Lashley claimed two rights—legitim and a claim in right of her mother; and the House of Lords held that the Court below was wrong in deciding that the settlement barred the claim in right of her mother. 2 Fraser, Husband and Wife, 2nd ed. 1325, says that the doctrine of implied contract is overruled. In *Hall's Trustees* v. *Hall* (3) the

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(1) 1 Burge, Col. and For. Law, 623–5; 1 Robert. 4; 4 Pat. 581, 613–4.

(2) 4 Pat. 587.

(3) 16 D. 1057.

Court took away a right of the wife on account of a change of domicil.

[RIGBY L.J. The judgment there appears to lay down the proposition that there is a change in the rights of husband and wife on every change of domicil.]

Yes; and Lord Eldon, in *Lashley* v. *Hog* (1), appears to have been of that opinion. In the note to Dicey's Conflict of Laws, 657, it is stated that, according to the American decisions, the rights are altered as to property acquired since the change of domicil. In *Lashley* v. *Hog* (1) Lord Eldon treats the subject as analogous to the law of succession, and says that if there is an implied contract on marriage there is a fresh implied contract on every change of domicil. *Foubert* v. *Turst* (2) is referred to by Lord Eldon in *Lashley* v. *Hog* (3), and is explained as depending on express contract. Lord Eldon's remarks in *Lashley* v. *Hog* (1) meet the arguments in Bar's International Law, 2nd ed. 416, as to the distinction between rights of property and rights of succession. *State* v. *Barrow* (4) decides that rights to property acquired after a change of domicil are governed by the law of the actual and not of the matrimonial domicil. *Murphy* v. *Murphy* (5) adopts the same view.

Renshaw, Q.C., and *Ingle Joyce*, for the plaintiff. In *Bonati* v. *Welsch* (6) it was decided that the rights of a wife under the law of France continued after the husband had become domiciled in New York.

[LINDLEY M.R. asked whether the Court went on the ground that as the husband had deserted the wife her domicil was not changed. It appeared from the report that the Court held her domicil not to have changed.]

In *Boyer's Case* (7) it was decided that the matrimonial domicil remained when the parties became domiciled in France as if they had entered into a contract that their rights should be governed by that law. Since the decision now under appeal was reported, some lawyers at the Cape have written on the point and referred to Van Zyl, Judicial Practice in South Africa, 438, and *Black* v. *Black's Executors* (1), in which it is laid down that the matrimonial domicil governs. In Bar's International Law, 413, the views on the point are summarised, and the writer sums up in favour of the view for which we contend.

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(1) 1 Burge, Col. and For. Law, 623–5; 1 Robert. 4; 4 Pat. 581, 613–4.

(2) 1 Bro. P. C. 2nd ed. 129.

(3) 4 Pat. 581, 613.

(4) (1855) 65 American Decisions, 109.

(5) (1817) 12 American Decisions, 475.

(6) (1861) 24 New York Ct. of App. 157.

(7) Dalloz, Jurisprudence Générale Recueil Périodique, 1854, Pt. I. p. 61 S.C. Sirez, 268.

[LINDLEY M.R. referred to the note on p. 419.]

The inconveniences resulting from each view are there shewn, but there is a balance of inconveniences. It is most inconvenient to apply to property acquired since a change of domicil a different law from that applied to property acquired before. Dicey, Conflict of Laws, 650. Very little seems to be known about *Lashley* v. *Hog*. (2) Paton did not report it till 1854, and the remark of Lord Eldon, cited by Westlake, Private International Law, 3rd ed. p. 74, from Robertson's Scotch Appeal Cases, does not appear in Paton's report. Most text-writers treat those words as the only part of *Lashley* v. *Hog* (2) applicable to a case like the present. Lord Eldon has been understood to say that rights of property and rights of succession are governed by analogous principles, but he can hardly have meant to say that. 2 Fraser, Husband and Wife, 2nd ed. 1325, makes the distinction between the two, and says that, at all events, change of domicil can only alter the rights as to after-acquired property. It is very difficult to make out distinctly what Lord Eldon meant in *Lashley* v. *Hog*. (2) The case of *Saul* v. *His Creditors* (3) turned on the special provisions of the Code of Louisiana. In *Hall's Trustees* v. *Hall* (4) it is doubtful whether there was a change of domicil. It does not appear with certainty that the husband ever had any domicil in Scotland. *State* v. *Barrow* (5) was a contest between two subsequently acquired domicils. *Foubert* v. *Turst* (6), as explained by Lord Eldon (2), has no bearing on the present case.

(1) (1884) 3 Juta, 200.
(2) 4 Pat. 581, 617.
(3) 16 American Decisions, 212.
(4) 16 D. 1057.
(5) 65 American Decisions, 109.
(6) Pr. Ch. 207; 1 Bro. P. C. 2nd ed. 129.

Dicey, Q.C., in reply. The first question is whether the case is not covered by authority. We say that it is—that there are decisions pointing to our conclusion, and that it is involved in the decision of *Lashley* v. *Hog.* (1) The remarks of Lord Eldon in that case are hard to be understood by any one who supports the view of the respondents, but according to our view they are clear enough. *Kennedy* v. *Bell* (2) shews how the Scottish Courts have understood the law to be. As to the foreign decisions, there are two schools of thought: the American Courts have taken our view; the Courts on the Continent of Europe that of the respondents. All writers agree that a right fully acquired cannot be taken away by a change of domicil, but where a right merely springs from the law of the country it is not unreasonable to consider that the parties have submitted themselves to the law of the new domicil. Most people would say that a wife who by going to another country lost a spes successionis from her husband by the change of domicil had lost a right, yet any spes successionis is certainly governed by the law of the new domicil. If this case is not already virtually decided, the Scottish system of looking to the last domicil ought to be adopted as decidedly the most convenient.

Cur. adv. vult.

May 19. The judgment of the Court (Lindley M.R., and Rigby and Collins L.JJ.) was now delivered by

Lindley M.R. This is an appeal from the decision of Kekewich J. (3) The question raised by this appeal turns upon whether the decision of the House of Lords in the case of *Lashley* v. *Hog* (4) applies to it or not. Kekewich J. has treated that decision as not applicable to the present case, and he has decided that a change of domicil has not affected the rights acquired by two French people in each other's unsettled movable property by their marriage in France. In order to appreciate *Lashley* v. *Hog* (4) and its true bearing on the case before us it is necessary to understand how at the date of that decision the law of Scotland stood as regards the effect of marriage on the movable property of the wife. By the Scottish law, on the marriage of two persons domiciled in Scotland the existing and after-acquired movable property of both husband and wife was regarded as a common fund (communio bonorum) divisible in certain shares on the death of either of them. But the whole of this so-called common fund was at the disposal of the husband during the marriage and was liable to the payment of his debts. During the marriage neither his wife nor his children had any right to any part of it. But the law applicable to this so-called communio bonorum did not depend in any way on whether any of the movable property which constituted it came from the wife or not. The proportion, if any, to which she contributed to it was of no importance. The whole was the husband's property, and his inability to dispose of the whole of it by will, and the rights to it which arose on the death of himself or his wife, in no way depended on the amount of her contribution, if any, to the common stock. Assuming a communio bonorum to exist, the right of the wife and children to it on his death, or, in other words, the distribution of the communio bonorum on the death of the husband, would on general principles of law be determined by the Scottish law of succession to the movable property of married men or widowers. So the persons to take the wife's share, if any, of the communio on her death would be decided by the law of succession as applied to her share. But when the question is, as it was in *Lashley* v. *Hog* (1), whether on the wife's death in her husband's lifetime any part of his property became hers or became payable to persons claiming through her as if it were her property, it is very difficult to understand upon what principle recourse is had to the law of succession. Apart from authority, we should have thought that the matrimonial law of the place where the parties were domiciled when they married, and not the law of the domicil of the husband on the wife's death, would have been the law to apply to such a question as that.

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(1) 4 Pat. 581, 617.

(2) 2 M. 587.

(3) [1898] 1 Ch. 403.

(4) 4 Pat. 581.

We pass now to *Lashley* v. *Hog* (1), which is reported also in

(1) 4 Pat. 581.

the appendix to Robertson on Personal Succession, No. 3, p. 414. Many questions were raised and decided on that appeal; but the only one which concerns us on the present occasion is the effect of the change of domicil on the rights of married persons to their respective unsettled movable properties. Mr. and Mrs. Hog, both of whom were English, married in England. Her unsettled movable property, existing and after acquired, became his, and she had no right to his movable property except what she might acquire under the Statute of Distributions if he died intestate. Mr. and Mrs. Hog had several children, and went to Scotland and became domiciled there, and they both died there. His wife predeceased him. One of their daughters married a Mr. Lashley. Mr. Hog had amassed a large fortune, and he left a will making provisions for his children. Mrs. Lashley, however, refused to take anything under her father's will, and insisted on her rights under the Scottish law. These rights were, as she insisted: (1.) A share of what her mother became entitled to in the communio bonorum when she died. (2.) A share of her father's property at the time of his death. She succeeded in establishing her right to a share of her father's estate in a previous litigation. (1) Owing to circumstances not mentioned here, she got the whole legitim. (2) Her claim to her share of what her mother became entitled to when she died remained to be decided, and that was one of the questions before the House of Lords in *Lashley* v. *Hog*. (3) The House of Lords decided in her favour, reversing the decision of the Scottish Court on this point. The judgment of Lord Eldon is extremely long, dealing with various matters which do not bear on the question we have to consider. We have all studied that judgment with great care in order to ascertain the real grounds on which his decision on this point was based. The case was argued for the appellant, Mrs. Lashley, on the ground that her father being a domiciled Scotsman when his wife died, the distribution of the property on the dissolution of the marriage must be regulated by the law of the place of the domicil of the married pair at that time. The

(1) 4 Pat. 583.

(2) 4 Pat. 609.

(3) 4 Pat. 581.

previous decision in favour of Mrs. Lashley's claim to legitim, i.e., her share of her father's estate on his death, was relied upon, and it was urged that no distinction could be made between a wife's share and a child's share. The argument for the respondent was to the effect that the destination of the movable property of married persons on the dissolution of the marriage depended on the law of the place where they were domiciled when they married; and that the death of the wife in the lifetime of her husband did not deprive him of what became his on his marriage. These were shortly the two views presented to the House of Lords for decision. The House adopted the view presented by the appellant, and held that on the dissolution of the marriage by the death of the wife a portion of the husband's property became divisible amongst those persons who would have become entitled to it by the law of Scotland if the husband and wife had been domiciled in Scotland when they married. The claim of the daughter to her share of her father's movable property on his death is intelligible enough. It is a mere illustration of the well-settled rule that the law of a person's domicil regulates the succession to his movable property. But the claim of the daughter to what became divisible on her mother's death cannot be explained on any such principle; for, although when that share became divisible the mother was dead, yet the father was not; and it was a part of his property which the daughter claimed and was held entitled to. The decision in her favour necessarily involves the view that the change of domicil affected the matrimonial rights of the husband and wife, and this was plainly what both Lord Eldon and Lord Rosslyn meant to decide, and what the House of Lords did decide. (1) Lord Eldon said distinctly (2) that it was best to hold that the wife's rights shifted with the domicil of her husband, and that was the basis of the judgment. It is plain that he was much influenced by the difficulty of making any distinction between the rights of a wife who survived her husband, and the rights of those who claimed her share if she died in his lifetime. (3) Lord Rosslyn concurred in Lord

(1) 4 Pat. 611–19.

(2) 4 Pat. 617.

(3) 4 Pat. 615.

Eldon's judgment, and repudiated the idea that marriage imported any implied contract which a subsequent change of domicil could not affect. It is impossible to escape from the conclusion that the change of domicil was held to have altered the respective rights of both husband and wife with respect to their unsettled movable properties. She acquired and he lost rights by the change even during his life. This decision is binding on us. It is true that there are several material differences between the Scottish and French matrimonial laws of property, the wife having more extensive rights under the law of France than she has under the law of Scotland. But these differences do not warrant us in holding that the law of the matrimonial domicil can prevail after such domicil has been changed. It is not altogether satisfactory to hold that a change of domicil cannot affect an express contract embodying the law of the matrimonial domicil, but that a change of domicil does affect the application of that law if not embodied in an express contract. But after all there is some practical convenience in holding that a change of domicil changes the rights of husband and wife as regards their respective unsettled movable properties, just as it changes their rights to obtain judicial decrees for separation and divorce and their testamentary powers. In America and in Scotland this view has prevailed; although on the Continent it has been repudiated as opposed to sound legal principle. After *Lashley* v. *Hog* (1) we do not consider the question open to judicial review in this country. We cannot regard the decision as based only on the law of Scotland, it decided a most important principle of private international law. The appeal, therefore, must be allowed, and the declaration made by Kekewich J. must be altered accordingly. The costs of the appeal will be costs in the summons.

Solicitors: *Tyrrell Lewis, Lewis & Broadbent; Hicks, Arnold & Mozley.*

(1) 4 Pat. 581.

H. C. J.

NORTH J.

1898

Feb. 24, 25; April 20; May 11.

In re RUSSELL INSTITUTION.
FIGGINS *v.* BAGHINO.

[1897 R. 1921.]

Statute—Construction—Literary and Scientific Institutions Act, 1854 (17 & 18 *Vict. c.* 112), *s.* 30 (1)—"*In the Nature of a Joint Stock Company.*"

A literary and scientific institution, in the property of which proprietors were interested in proportion to the number of their shares, which shares were transferable and transmissible:—

Held, to be in the nature of a joint stock company within the meaning of the Literary and Scientific Institutions Act, 1854, s. 30.

In re Bristol Athenæum, (1889) 43 Ch. D. 236, discussed.

THE Russell Literary and Scientific Institution was established in the year 1808, and was carried on down to the time of its dissolution, mentioned below, at premises in Great Coram Street, Russell Square, held by trustees for the institution under a lease from the Duke of Bedford, which expired on September 29, 1897.

The objects of the institution were the formation of a library consisting of the most useful works in ancient and modern literature, and the establishment of reading-rooms provided with the best foreign and English journals and other periodical publications for the use of members, and the delivery of lectures on literary and scientific subjects. The funds for establishing and mainly supporting the institution were raised by shares of twenty-five guineas each, transferable and transmissible on the death of the proprietor.

The original rules of the institution provided for the manage-

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(1) "If upon the dissolution of any institution there shall remain, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the said institution or any of them, but shall be given to some other institution, to be determined by the members at the time of the dissolution, or in default thereof by the judge of the county court aforesaid; provided, however, that this clause shall not apply to any institution which shall have been founded or established by the contributions of shareholders in the nature of a joint stock company."

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ment of the institution by a committee comprising a president, vice-presidents, and other members elected by the proprietors.

Annual and life subscribers were admitted to the benefits of the institution.

One of the rules was: "When the interest of the whole capital shall be sufficient to defray the current expenses independently of annual subscriptions (and not before), a certain portion of the annual revenue, to be determined by the committee for the time being upon consideration of the state of the library, shall be appropriated by way of dividend among the proprietors."

No dividend was ever paid to the proprietors.

At the annual meeting of the proprietors held on April 26, 1847, with the object of obtaining exemption from payment of rates under the Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), the rules were amended by substituting for the rule before set out the following: "No dividend, gift, division, or bonus in money or otherwise shall be made unto or between any of the proprietors or members of the institution." It was, however, decided by the Court of Queen's Bench in *Russell Institution* v. *Vestry of St. Giles and St. George* (1) that the institution was not a society established for the purposes of science, literature, or the fine arts exclusively, and therefore not exempt from rates.

New rules were made in 1857 and amended in 1860. The new rules provided "proprietors are and shall be interested in the property of the institution in proportion to the number of shares they hold"; and "the building and funded property of the institution shall be vested in the trustees, to be held and disposed of for the benefit of the proprietors of the institution"; and "all suits by or against the institution shall be in the name of the secretary for the time being, or in the name of such other person as shall from time to time be appointed by the committee."

There was no rule relating to the dissolution of the institution.

At a general meeting of the proprietors held on April 25, 1896, it was unanimously resolved that May 1, 1897, be the date fixed for the closing of the institution so far as its ordinary use was concerned, and that a liquidation committee be appointed, to consist of the trustees and managers, to take steps for the sale of the books, realization of stock and other assets, to arrange for the surrender of the premises at the expiration of the lease, and to make all necessary arrangements in connection therewith.

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(1) (1854) 3 E. & B. 416.

The resolution was duly confirmed at a meeting of proprietors held on May 16, 1896.

In pursuance of the resolution all the property belonging to the institution had been sold and converted into money, and, after paying all the costs of such sale and all the debts and liabilities of the institution, there remained in the hands of the plaintiffs as trustees thereof the sum of 1600*l.* or thereabouts.

This was an originating summons taken out by the trustees of the institution to determine whether the proceeds of the property of the institution were upon the dissolution thereof divisible among the proprietors thereof, and, if so, in what shares and proportions, and, if not, in what manner and for what objects the plaintiffs ought to apply the same. The only defendant was a representative proprietor of the institution.

Swinfen Eady, *Q.C.*, and *Elgood*, for the trustees. It is our duty to submit that this institution comes within s. 30 of the Literary and Scientific Institutions Act, 1854, and that the funds in the hands of the trustees ought to be applied to some other institution, which, though not expressed to be so, must be of a kindred character. In the case of *Russell Institution* v. *Vestry of St. Giles and St. George* (1), it was held that this institution was not instituted for the purposes of literature, science, or the fine arts exclusively. That decision turned on the word "exclusively," and has no application to the present case; there can be no doubt that the main object of the Russell Institution has been literary and, to a less extent, scientific, and the Act applies not only to new institutions, but to institutions existing when the Act was passed. The only question there can be is whether the institution falls within the exception to s. 30 as being in the nature of a joint stock company. The

(1) 3 E. & B. 416.

natural idea conveyed by the words "joint stock company" is a company where profits and losses are shared by members in proportion to their interest, differing only from a partnership in that the shares are transferable without the consent of the other members, and usually limited in liability; and Kay J. has so held in a case very similar to the present: *In re Bristol Athenæum.* (1) This is not a company within the Joint Stock Companies Acts past or existing.

Henry Terrell, Q.C., and *Douglas*, for the defendant. In the first place, we contend that this institution is not within the Act of 1854 at all; that Act is not intended to apply, and does not apply, to every institution that has for part of its objects literature and science; and this very institution has been held to be not exclusively devoted to literature, science, and the fine arts: *Russell Institution* v. *Vestry of St. Giles and St. George.* (2) The rational limitation to put on the Act is to confine it to institutions of a public or charitable nature, so as not to include a society like the present, called into existence for the benefit and enjoyment of its supporters. There are many powers and privileges provided in the Act not applicable to a private society.

In the second place, if this is an institution coming within the Act of 1854 for any purpose, it is excepted from the operation of s. 30 as being "in the nature of a joint stock company." Kay J. in *In re Bristol Athenæum* (1) laid down as the test to determine whether an association is a joint stock company the sharing in profit and loss. As originally constituted, this institution fulfilled that condition, and its nature has not been altered. The actual point for his Lordship's decision was whether an order ought to be made to wind the association up. His Lordship decided that an order could not be made. This institution, it is true, was not one that required registration, and possibly it may not improperly be excluded for certain purposes from the term "joint stock company." The exception, however, is not simply of joint stock companies to which in their popular sense the Act of 1854 does not apply at all, but the exception is of institutions in the nature of joint stock

(1) 43 Ch. D. 236.

(2) 3 E. & B. 416.

companies; and an institution like this, where the property was obtained by joint contribution of proprietors, and is held in trust for the proprietors in proportion to the number of their shares, and the shares are transferable and transmissible, partakes largely of the character of a joint stock company.

Elgood, in reply.

May 11. NORTH J., after stating the facts:—One of the rules I have read provided that the property of the institution was to be held in trust for the proprietors. Then the question is, why the sum in hand should not be divided among them. I think it clear that the society is a proper legal society. It has not been registered, but there is no reason why it should have been registered. [His Lordship in this part of his judgment referred to s. 2 of the Joint Stock Companies Act, 1844 (7 & 8 Vict. c. 110), and the several cases, *Reg.* v. *Whitmarsh* (1), *Moore* v. *Rawlins* (2), *Crowther* v. *Thorley* (3), and *In re Siddall* (4); and stated the effect of the Literary and Scientific Institutions Act, 1854, and continued:—]

Now, the question has been raised whether this institution comes within the class of institutions referred to by that Act. There are two questions: first of all, whether it comes within the Act at all; and, secondly, if it does come within the Act, then whether it is a body the surplus of whose funds must go to some similar institution, or whether it comes within the proviso at the end of s. 30, which makes s. 30 inapplicable to it. Now, the first thing to be noticed here is that this institution was formed in 1808, long before 1854, when that Act was passed. But I think it is clear that that does not make any difference. The 33rd clause, speaking of the institutions to which this Act is to apply, contains at the end a proviso that two existing institutions should be exempted from its operation, and that in itself is conclusive to shew that the institutions excepted would but for that exception have been subject to the provisions of the Act; and there are several of the other provisions of the Act which seem to me to make it clear, though it

(1) (1850) 15 Q. B. 600.
(2) (1859) 6 C. B. (N.S.) 289.
(3) (1884) 32 W. R. 330.
(4) (1885) 29 Ch. D. 1.

not necessary to refer to them, that the Act applied to existing institutions as well as those founded after the passing of the Act. I may add that in *In re Bristol Athenæum* (1), which I shall have to refer to directly, Kay J. decided that an institution exactly like this clearly did come within the Act.

Then the next point that Mr. Terrell pressed me upon very strongly is this: that notwithstanding s. 33, this institution does not come within the Act. Now it will be remembered that by s. 33 the Act is to apply to every institution for the time being established for the foundation or maintenance of libraries, or reading-rooms for general use among members, or open to the public. This seems to me to be clearly a library or reading-room for general use among members, though not open to the public; and those words, to my mind, clearly include it. But then the argument was that notwithstanding those words, if they stood alone, might include it, you must look at the whole of the Act; and if its provisions are gone through carefully, it will be seen that it cannot be intended to apply to every such institution: that the power to give land to a limited amount, even by incapacitated persons, for such a purpose, and the various provisions which I have read, and which I will not refer to in detail again, all indicate that it could not have been intended to give the powers of the Lands Clauses Act, or the other powers conferred by that Act, to a mere simple private institution such as this was; and, therefore, it was said, these words in the 33rd section must be read with reference to the whole Act, and the whole Act must be taken not to apply to every institution coming within the words; but that to be an institution within the Act it must be one of either a public or a charitable nature. But I cannot assent to this argument. I think the words contemplate a library or reading-room for general use among members, or open to the public; and, therefore, there is a contrast between what is for the use of the public and what is not for the use of the public, but for private members. I do not see how I can say that, from what is called the general scope of the Act, the Act does not apply. Kay J.'s decision clearly treated a similar institution as being within the

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(1) 43 Ch. D. 236.

Act; and it is clear that the society themselves thought they were within the Act, because they took advantage of the 21st section of the Act, and by their rules appointed a person in whose name to sue and to be sued; and I do not know anything excepting that section which would enable them to have done anything of that kind. It seems to me, therefore, that it is a case which comes within the Act read as a whole, and I confess I cannot see where the line could be drawn, as I am asked to draw a line, between those societies which do come within it and those which do not. This was an institution of considerable means—the capital came to something like 20,000*l.*—and a great many of the charitable institutions which it is admitted the Act must include are of a more humble character than an association of that kind; and as regards the argument that it could not have been intended that all these powers shall apply to such an institution as this, it must be remembered that the Act was passed for the purpose of giving such powers where they are wanted. It does not say that every section is to be applied to every company which comes within the terms of the Act; the powers are given to be used if necessary. In the present case I do not see that advantage was taken of them in any way except by appointing the secretary as the person to sue and to be sued, and by passing resolutions to dissolve.

Then we come to the remaining question, whether, if this institution is within the Act, s. 30 applies to it or not. [His Lordship read that section, and proceeded:—]

Now before construing that section I must refer to the decision of Kay J. which I have mentioned, which is the only decision cited, and the only one I know of bearing on this case at all. That was with respect to the Bristol Athenæum, a body extremely like the Russell Institution. It was founded in 1844, before the passing of the Act of 1854. There were shareholders, and there were life subscribers and annual subscribers; the property was vested in trustees for the purposes of the institution, which was carried on for a considerable time; but in 1888 the property was disposed of and the books and fittings were sold. The question was, what was to be done with the surplus sum of about 900*l.*; and the application was

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for a winding-up order under s. 199 of the Companies Act, 1862. [His Lordship read the first portion of Kay J.'s judgment down to the words "trading under the Act," and continued:—]

There the matter might have stopped. That would dispose of the whole case, that the company could not be wound up under s. 199 of the Companies Act, 1862. The present application before me is not under that Act at all. The trustees in the *Bristol Case* (1) had not applied for the direction of the Court as to the surplus trust funds in their hands. The learned judge subsequently dealt with matters that were not necessary for the decision of that case, but his remarks are very germane to the matter I have to consider now. I proceed, therefore, to read the rest of his judgment. [His Lordship read the remainder of the judgment of Kay J., and continued:—]

It will be noticed that all the latter part of what I have read had nothing whatever to do with the actual decision of the case before the Court. All that was decided was that there could be no winding-up order under the Companies Act, and therefore the petition was dismissed, and there was no order made except providing for the costs. The judge had not before him —I do not know whether and to what extent the construction of this Act was argued before him or not—but he clearly had nothing before him for decision as to the meaning of the section in question. Still his observations upon it are entitled to great weight, and though I do not agree with them, it is necessary to consider very carefully what they are. First of all, he decides that such an institution cannot be wound up under that Act. If I may say so, I entirely agree. Then the next thing is, he says, "In the first place, this does not seem to me to be a joint stock company." However, the exception is not of a joint stock company, but of an institution which shall have been founded or established by the contributions of shareholders in the nature of a joint stock company. That means some body which is not a joint stock company, but something in the character of, or in the nature of, a joint stock company. Then he goes on to say: "This does not seem to be a joint stock company, because it is constituted by rules which do not permit of any dividend, division, or bonus among the members." Now, in the present case it is to be borne in mind the original rules did contemplate that very thing—they provided for a dividend being paid to the members; and it is difficult to see how, if this company was in the nature of a joint stock company so long as it had the power of paying a dividend, it ceased to be in the nature of a joint stock company and became something different because, for a different purpose altogether, they determined that they would not distribute any part of their funds in that way. The real difficulty I feel in this decision is this: that it lays down that an institution is not a joint stock company because it is constituted by rules which will not permit any dividend, division, or bonus among its members. Now it seems to me, with great deference, that is not a material matter. It is not the essence of a joint stock company that it should provide for a dividend or bonus among its members. The Act we are considering does not refer to that matter. It says, "founded or established by the contributions of shareholders in the nature of a joint stock company," and that the present company unquestionably was; though it is true the Bristol Athenæum Institution was, in the same way. But when one looks at the Acts relating to joint stock companies, one sees it is not at all of the essence of a joint stock company under those Acts that it should pay a dividend. The 7 & 8 Vict. c. 110, provided, "That this Act shall apply to every joint stock company as hereinafter defined"; and then it says: "The term 'joint stock company' shall comprehend every partnership whereof all the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the co-partners." That is one of the leading differences between an ordinary partnership, in which no member can sell his shares without the consent of all the rest, and a company, in which owners of shares can transfer without the consent of the others; and, therefore, this important distinction, recognised in this Act as the point which is characteristic of a company, that the shares are transferable without the express consent of the partners, is certainly found

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(1) 43 Ch. D. 236.

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in the present case. But that Act does not contemplate the payment of a dividend as essential for companies registered under it.

Then taking the Companies Act, 1862, s. 4, that very section draws a distinction between a company that has for its objects the acquisition of gain, which has to be registered, and a company with an equally large number of members which has not to be registered because it is not formed for the acquisition of gain. Therefore, that section itself expressly recognises the existence of joint stock companies having for their object the acquisition of gain as distinguished from others which have no such object.

Then if we turn to the 21st section of the same Act we find again a clear distinction between joint stock companies within the Act formed for objects involving the acquisition of gain, and others which are not. Again, the 23rd section of the Companies Act, 1867, expressly refers to joint stock companies in which the payment of any dividend to members is expressly prohibited.

It seems to me, with great deference to the learned judge, that the test he applied, that an institution could not be a joint stock company if it was constituted by rules which did not permit of any dividend, division, or bonus among its members, is one which cannot be sustained. I feel great diffidence in differing from the learned judge, but, having heard the case fully argued, I feel bound to say what my opinion is. I feel emboldened in doing so, because I have had the advantage of speaking to Stirling J. (who, I was told, had reserved judgment in a similar case), and considering the question with him. He and I both agree in our views as to the meaning of the Act, and as to the decision upon which I have just been commenting. The remark of the learned judge that a rule providing for the division of the property of an institution among its members was contrary to the Act, and could not be got rid of by rules, does not apply here; because it only applies to institutions which come within the 30th section, and are not within the proviso at the end of it. This institution comes within the proviso, and therefore the 30th section does not

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apply to it. There is nothing, therefore, contrary to the Act in the rule that the property is to be held in trust for the proprietors; and I must answer the question put to me by saying that the fund is divisible among the proprietors in proportion to the number of shares they hold. (1)

Solicitor for plaintiffs: *F. B. Moyle.*
Solicitors for defendant: *Carthew & Wheeler.*

D. P.

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(1) See *In re Jones*, post, p. 83.

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[1897 J. 1832.]

Scientific Society—Dissolution—Distribution of Assets—Literary and Scientific Institutions Act, 1854 (17 *&* 18 *Vict. c.* 112), *ss.* 30, 33.

A society falling within the general scope of the Literary and Scientific Institutions Act, 1854, may be an institution in the nature of a joint stock company within the exception in s. 30, although not formed for purposes of profit, if it has the other usual indicia of a joint stock company—as, for example, if it has common property derived from the contributions of its members, and held by them in transferable shares.

In re Bristol Athenæum, (1889) 43 Ch. D. 236, considered.

A horticultural society was constituted in 1844 under a deed which provided that any person who paid a certain fixed sum to the funds of the society should be a member and entitled to one share in the society, which was to be transferable by him or his legal personal representatives, and that each member should pay a fixed annual subscription, and should be entitled to admission for himself and family to the gardens of the society, but should not be entitled to any dividend or bonus, nor to any interest in the property of the society except the right to participate in the profits on a dissolution:—

Held, that the society came within the exception in s. 30 of the Literary and Scientific Institutions Act, 1854, and that upon dissolution the property of the society became distributable among the members.

THIS was a summons taken out by W. E. Clegg, suing on behalf of himself and all other the shareholders of the Sheffield Botanical and Horticultural Society, asking that the defendants, the trustees and committee of management of the society, might be ordered to sell the property of the society pursuant to resolutions passed and confirmed at meetings of members of the society held on April 26 and May 10, 1897, and to distribute the proceeds of such sale in accordance with those resolutions.

The Attorney-General was subsequently added as a defendant, in order to raise the question whether this society was subject to the provisions of the Literary and Scientific Institutions Act, 1854.

The society was established under a deed of constitution dated

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October 15, 1844, which contained the following rules and regulations:—

"1. That the said society shall be denominated 'The Sheffield Botanical and Horticultural Society,' and that its objects shall be the encouragement and cultivation of the science of botany and horticulture, with a view to the instruction and recreation of the members of the society and their families.

"2. That the said society shall not make any dividend, gift, division, or bonus in money unto, between, or among any of its members, nor shall any member, in respect of the share or shares held by him, have or be entitled to any share or interest in the gardens or other property of the society, further than that in the event of a dissolution thereof, under the rules for the time being in force, the members then constituting the society shall be entitled to the property of the society according to their respective shares therein, as personal estate, after payment of all debts due therefrom, and providing for all engagements then entered into by the society, or to which it shall then be liable."

Rule 3 provided that certain persons should be appointed a committee of management.

Rule 4 provided that certain gardens which had been recently purchased for the society, and all other real estate which should belong to the society, should be vested in certain trustees "upon such trusts as shall secure to the members of the society and their families, and to such other persons as in pursuance of these rules shall be entitled thereto, the free use and enjoyment of the gardens under the management of the committee, and subject and according to the rules of the said society for the time being."

Rule 5 provided for the vesting of all the personal property of the society in the committee for the time being.

The rules then provided as follows:—

"6. That every person who has already paid, or who shall hereafter pay, to the funds of the society five pounds, and who shall execute this deed or articles of constitution, or a separate deed or agreement, with any five of the committee for the time being, that he will observe and perform the same, and the rules

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and regulations for the time being in force for the management and government of the society, shall be a member of the society, and shall be considered as having one share therein; and for every further five pounds so paid by such person, he shall be considered as having an additional share therein, subject to such regulations as the committee for the time being shall make for limiting the number of shares in the society.

"7. That every member shall pay an annual subscription of fifteen shillings, or such smaller sum as the committee for the time being shall require, in respect of each share held by such member, for which he shall receive a ticket of admission to the gardens of the society."

Rule 8 directed that a register of members should be kept.

Rule 10 provided as follows: "That any member, or the executor or administrator of any deceased member, who shall have duly observed all the rules and by-laws of the society, may, with the consent of the committee, and in such manner and subject to such regulations as they shall from time to time appoint, substitute any other person in the place of himself as a member of the said society in respect of his share or shares, or of any one of his shares therein."

Rule 12 provided that every member should have admission for himself and his family to the gardens of the society.

Rule 14, which was subsequently added, provided for the issue by the committee through the secretary of annual season tickets to non-shareholders at certain rates therein named, and stipulated that the proceeds of such sales of season tickets should be divided pro ratâ at the last meeting of the committee in each year amongst the holders of more than one share.

Rule 15, which was also subsequently added, provided that all persons resident beyond a circuit of seven miles from the parish church of Sheffield might be admitted to the gardens "on the introduction of a member (i.e., shareholder)"; and that annual subscribers desirous of obtaining admissions for persons resident without the aforesaid seven miles should pay 6*d.* per person for each such admission, the proceeds of such admissions to be paid to the general fund of the society.

Rule 19 prohibited the admission of any person resident within the seven miles' circuit except such as were entitled by these rules.

Rule 19*a*, which was subsequently added, empowered the committee to open the gardens to the public on payment of a sum of 6*d.* or 1*s.* each for one evening in each week in the summer months.

Rule 38 empowered the committee to institute a school for the instruction of the members of the society and their families in botany, horticulture, and vegetable physiology, "so that no expense arising from such institution shall be chargeable to the funds of the society."

Rule 40 provided for the sale and exchange of spare plants, fruits, and flowers under the direction of the committee for the benefit of the society.

Rule 41 provided as follows: "That the annual subscriptions and all other moneys payable to the said society shall be applied under direction of the committee in payment of the expenses of the society, and to the maintenance and improvement of the gardens."

Rule 45 was as follows: "That it shall be lawful for any meeting of the society specially called for the purpose, by a majority of not less than two-thirds of the votes of the members present at such meeting, to resolve that the dissolution of the society is expedient; and if such resolution shall be confirmed by a like majority of votes at a second meeting, likewise specially called for the purpose, and held within two calendar months after the previous meeting, then the committee and trustees shall forthwith proceed to wind up the affairs of the society and sell the property thereof, subject to such instructions as shall be given at the last of such two special meetings, or at any subsequent meeting specially called for the purpose."

The gardens which formed the property of the society were conveyed to trustees for the society by a deed dated June 20, 1845. The property at the time of the conveyance was subject to a mortgage for 3000*l.*, which had since been paid off. The purchase-money and the mortgage debt were paid and discharged out of the funds of the society contributed by the members. Recently the gardens had not been carried on with financial success, and at meetings of the society held on April 26 and May 10, 1897, resolutions were passed that the society should be dissolved, and that its property should be sold to a public body known as the Town Trustees of Sheffield, at a price sufficient, after payment of debts and liabilities and costs, to pay to each member the sum of 5*l.* for every share held by him. It was admitted that the value of the property probably exceeded such an amount.

Upjohn, Q.C., and *Ingle Joyce*, for the summons. The question is whether this society comes within s. 30 of the Literary and Scientific Institutions Act, 1854 (1), which prohibits any distribution of assets among the members upon a dissolution, and requires them to be given to some other institution.

First, we say that this society is not a scientific institution within the scope of the Act. The Act points to institutions of a public character; but this society is a private club, and has no charitable objects. Further, some of the provisions of the Act are inapplicable to the constitution of this society: see ss. 21, 29.

Secondly, if this society is a scientific institution within the Act, it is an institution established by the contributions of shareholders in the nature of a joint stock company within the proviso in s. 30, and is therefore exempt from the operation of that section. This question has been discussed in *In re Dutton* (2) and *In re Bristol Athenæum* (3); but in both those cases the objects of the institution and the mode of raising the funds were materially different, and they do not govern the present case. We submit that the sale ought to be carried out and the proceeds divided among the members in the manner proposed.

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(1) Sect. 30 provides, "If upon the dissolution of any institution there shall remain, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the said institution or any of them, but shall be given to some other institution, to be determined by the members at the time of the dissolution, or, in default thereof by the judge of the county court aforesaid; provided, however, that this clause shall not apply to any institution which shall have been founded or established by the contributions of shareholders in the nature of a joint stock company."

(2) (1878) 4 Ex. D. 54.

(3) 43 Ch. D. 236.

John Dixon, for the trustees and committee of management, supported the application.

Sir R. E. Webster, A.-G., and *R. J. Parker*, for the Attorney-General. Both on principle and authority this society comes within the Act. It is not seriously disputed that it is included in the definition clause, s. 33; the important question is whether it falls within the proviso in s. 30. As to that, we say, first, that the members of this society are not in any proper sense of the term shareholders; and, secondly, that this society is not in the nature of a joint stock company. The meaning of "joint stock company" at the date when the deed of constitution was framed, and at the date when the Act was passed, was a company formed for the purposes of profit, and the intention of the Legislature was simply to except from the provisions of s. 30 associations of persons contributing money to a common fund with a view to carrying on business and sharing profits. But the deed shews that this society was formed to promote the science of horticulture, and that the making of any bonus, dividend, or profit was not in contemplation. *In re Bristol Athenæum* (1) covers this case.

Ingle Joyce, in reply.

Cur. adv. vult.

May 14. STIRLING J., after reading the summons and referring to the provisions of the deed of October 15, 1844, continued as follows:—

The general effect of the deed of constitution appears to me to be that the real estate of the society was vested in trustees, and the personal estate in the committee of management; that every person who paid to the funds of the society 5*l.* and executed the deed became a member and entitled to one share in the society which was transferable by him or his legal personal representatives; that each member was liable to pay an annual subscription of 15*s.*, and was entitled to admission for himself and his family to the gardens of the society, but

(1) 43 Ch. D. 236.

was not entitled to any dividend or bonus, or any interest in the property of the society, except that upon a dissolution he was entitled to a share of the profits of the society after the payment of debts and liabilities.

[His Lordship stated the facts, and referred to the Literary and Scientific Institutions Act, 1854, ss. 29, 30, and 33, and continued as follows:—]

The plaintiff and the defendants, the trustees and managers, contend that the society falls within the exception to s. 30, or, in other words, is an institution which has been founded or established by the subscriptions of shareholders in the nature of a joint stock company. The contention on behalf of the Attorney-General is, first, that the members are not shareholders in the proper sense of the term; and, secondly, that the society is wanting in one of the necessary elements of a joint stock company—namely, that it should be carried on for the purposes of gain.

As regards the first of these points, it appears to me it is not well founded. The suggestion is that the payment of 5*l.* mentioned in the deed of constitution is merely in the nature of an entrance fee; but this seems to me to attribute too little force to the language of the deed. The contributor of 5*l.* is to be considered as having a share in the society, which is transferable, and entitles the holder to certain benefits in the way of enjoyment during the continuance of the society, and to participate in the distribution of the property upon dissolution. Although, if the argument on behalf of the Attorney-General be well founded, any such participation is forbidden by the statute of 1854, still it is to be borne in mind that that prohibition was not in force at the date of the deed, and the provisions of clause 2 may be taken into consideration in ascertaining whether or not the members are shareholders. In my opinion they are.

The other contention is much more serious. In the first place, I think that the society was not founded for purposes of profit. Clause 2 distinctly prohibits any dividend, division, or bonus. The language follows that of s. 1 of 6 & 7 Vict., c. 36, under which societies established for purposes of science, literature, or the fine arts are exempted from rates on certain terms, of which two are that the society should be supported wholly or in part by annual voluntary contributions, and should not, and by its laws might not, make any dividend, gift, division, or bonus in money unto or between any of its members. This affords a reason for the prohibition of dividends found in the deed of constitution. Still that prohibition constitutes a prominent feature in the deed, and clauses 14, 15, 19*a*, and 40 appear to me to be provisions as to management and not to affect the result.

The question then arises whether the absence of any purpose of profit precludes the application of the proviso at the close of s. 30. That proviso is not that the clause "shall not apply to any institution which shall be a joint stock company," but "shall not apply to any institution which shall have been founded or established by the contributions of shareholders in the nature of a joint stock company." That appears to me to mean that such an institution was not to be actually in all respects a joint stock company, but to be such as, without being a joint stock company, should in some respects partake of the nature of such a company.

If it be asked what elements of a joint stock company were more particularly contemplated by the Legislature, I should say these—first, the existence of a joint stock or common property; secondly, the contributions of members as the source of such property; and, thirdly, the holding of that property by numerous persons in transferable shares.

All these ingredients exist in the constitution of the society. No doubt joint stock companies are ordinarily formed for the purpose of profit, but many associations exist which are not formed for that purpose to which it would be hard to deny the nature of joint stock companies. Under the Companies Act of 1862 it appears to be clear that a joint stock company may be formed for other purposes than those of profit. [His Lordship referred to ss. 6 and 21 of the Act of 1862 and s. 23 of the Act of 1867, and continued:—]

Sect. 4 of the Act of 1862 prohibits the formation of any company consisting of more than twenty persons for the purpose of carrying on any business that has for its object the acquisition of gain by the company or by the individual members thereof unless registered as a company under the Act. Upon this section it has been repeatedly held that associations of more than twenty persons may exist which do not require to be registered, and are not made illegal by the Act of 1862: see, for example, *Smith* v. *Anderson* (1), *Crowther* v. *Thorley* (2), and *In re Siddall* (3); yet it would be difficult to deny to those associations the nature of joint stock companies.

The Joint Stock Companies Act of 1844 (7 & 8 Vict. c. 110) applies only to joint stock companies established for the purpose of profit, and it was repeatedly held—see *Reg.* v. *Whitmarsh* (4), *Bear* v. *Bromley* (5), and *Moore* v. *Rawlins* (6) —that associations which very closely resemble joint stock companies did not require registration under that Act.

On behalf of the Attorney-General, some observations of Kay L.J. (then Kay J.) in *In re Bristol Athenæum* (7) were properly relied on. The actual decision in that case was that the Bristol Athenæum, an association possessing a constitution somewhat similar to that of the Sheffield society, could not be wound up as an unregistered company under s. 199 of the Companies Act, 1862, and with that decision I do not differ. Incidentally, however, his Lordship did express the opinion that the Bristol Athenæum was not a joint stock company, and therefore not within the proviso of s. 30 of the Act of 1854. No one can be more sensible than I am of the weight due to anything which fell from the learned Lord Justice; but I have, while preparing my judgment, been informed by North J. that he has in a case before him arrived independently at a similar conclusion with regard to the construction of s. 30 to that which I have endeavoured to express. On the main question, therefore, I think that the applicant is entitled to the order which he asks. (8)

(1) (1880) 15 Ch. D. 247.
(2) (1884) 32 W. R. 330.
(3) (1885) 29 Ch. D. 1.
(4) (1850) 15 Q. B. 600.
(5) (1852) 18 Q. B. 271.
(6) (1859) 6 C. B. (N.S.) 289.
(7) 43 Ch. D. 236.
(8) See *In re Russell Institution*, ante, p. 72.

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[His Lordship, however, upon a question as to the sufficiency of the notices convening the meetings of April 26 and May 10, held that the notices did not comply with the requirements of the deed of constitution, and directed the summons to stand over in order that further meetings might be convened.]

Solicitors: *Pilgrim & Phillips, for Watson, Esam & Barber, Sheffield; Treasury Solicitor.*

H. B. H.

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[1898 Z. 163.]

Practice—Arbitration—Submission—Action—Application to Stay Proceedings—Time—"Step in the Proceedings"—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

The mere filing of affidavits in answer to a motion for a receiver in an action for dissolution of partnership is not a "step in the proceedings" within s. 4 of the Arbitration Act, 1889, the taking of which will preclude the defendant from moving to refer the case to arbitration under a clause in the partnership articles.

Motion.

The action was for dissolution of the partnership subsisting between the plaintiff and the defendant under articles dated May 4, 1897. The deed contained an arbitration clause in the usual form. The plaintiff alleged that the defendant had adopted a course of conduct which was prejudicial to the success of the partnership business. On March 22, 1898, he gave notice of motion for the appointment of a receiver, and in support of the motion he filed affidavits in which he made various charges of misconduct against the defendant.

The writ was issued on March 16, 1898, and the notice of motion was served therewith on March 22, 1898.

The defendant entered an appearance, and filed affidavits in answer to the charges made against him by the plaintiff; and on April 16, 1898, the plaintiff's motion having stood over once or twice in the interval, the defendant gave notice of motion to refer all matters in difference between the parties to arbitration under s. 4 of the Arbitration Act, 1889.

The two motions were heard together.

Butcher, Q.C., and *E. W. Lavington*, for the plaintiff. The motion to refer is too late. The only step which can be taken by the defendant without precluding himself from arbitration is the entering of appearance. Here the defendant has filed affidavits in answer to the motion for a receiver, and that constitutes a "step in the proceedings" within the meaning of s. 4. *Boyle* v. *Sacker* (1) is a decision on similar words in Order LXX., r. 2, of the Rules of the Supreme Court, 1883. See also *Ford's Hotel Co.* v. *Bartlett.* (2)

Jenkins, Q.C., and *Stanley Fisher*, for the defendant. The mere filing of affidavits in defence to a motion is not a "step in the proceedings" within the meaning of the section: *Brighton Marine Palace and Pier, Limited* v. *Woodhouse* (3); *Ives & Barker* v. *Willans.* (4)

STIRLING J. (after dealing with the motion for the appointment of a receiver, and holding that the application was premature). Then there is another motion to stay all proceedings in the action, and refer all the matters in dispute to arbitration, pursuant to s. 4 of the Arbitration Act. That is based on a clause in the partnership articles. [His Lordship read the clause, and continued:—]

Having regard to the nature of the disputes between the parties, I think that this is eminently a case for arbitration. The proceedings would be short, and the determination of the matters in dispute would be more speedily arrived at than in any other way. The judgment of two business arbitrators, or an umpire properly chosen, would be more satisfactory than the decision of a judge, even after having the witnesses before him. It seems to me that this is eminently a case in which arbitration is the proper course to adopt. But it is said that it is too late for the defendant to move to refer to arbitration.

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(1) (1888) 39 Ch. D. 249.

(2) [1896] A. C. 1, 4.

(3) [1893] 2 Ch. 486.

(4) [1894] 2 Ch. 478.

Sect. 4 of the Arbitration Act provides that, "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

What has happened is this. The plaintiff gave notice of motion for the appointment of a receiver. In support of it he filed certain affidavits. Those were answered by the defendant, and not until after the motion had come on and been ordered to stand over once or twice did he give notice of his motion to refer to arbitration. The question is whether he has taken a "step in the proceedings" within the meaning of the Act, so as to render his notice of motion to refer to arbitration too late. I quite agree as to the importance of applications to stay proceedings being made speedily. That is the meaning of the Act; but the question is, What is a "step in the proceedings" which will preclude a party to the action from moving to refer the case to arbitration?

In *Ives & Barker* v. *Willans* (1) Lindley L.J. said: "The authorities shew that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings."

It seems to me that the mere filing of affidavits in defence to a motion for a receiver is not in the nature of an application

(1) [1894] 2 Ch. 484.

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to the Court, and consequently not a "step in the proceedings" within the meaning of the section. By such a step is meant a substantive step taken by a party. It may be that a very limited application to the Court—such as taking out a summons for extension of time—would be enough. That has been so decided in *Ford's Hotel Co.* v. *Bartlett.* (1) In *Brighton Marine Palace and Pier, Limited* v. *Woodhouse* (2), before North J., the motion was ordered to stand over to the trial, and it does not appear whether affidavits had been filed or not.

But I do not think in this case the defendant has taken a "step in the proceedings" within the meaning of the Act, and therefore I think I ought to make an order in accordance with the application. That being so, the motion for a receiver will stand over, for it may be useful hereafter, until after the arbitrator has decided all questions in the action, of which this may be one.

Solicitor for plaintiff: *James Terrell.*
Solicitors for defendant: *Fishers.*

(1) [1896] A. C. 1, 4.

(2) [1893] 2 Ch. 486.

G. A. S.

STIRLING J.

1898

March 29, 30;
April 30.

In re DU CANE AND NETTLEFOLD'S CONTRACT.

Settled Land Act—Sale by Tenant for Life—Instrument affecting Interests created by Original Settlement—Appointment of Trustees of Compound Settlement—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 2, 3, 20, 22, 38, 45, 50—*Settled Land Act*, 1890 (53 *&* 54 *Vict. c.* 69), *s.* 4.

As a general rule it is not necessary, whenever a deed has been executed affecting the interests created by an original settlement, so that that settlement is no longer the only instrument "under or by virtue of which the land stands limited for the time being to or in trust for persons by way of succession," to appoint trustees of a compound settlement constituted by the original settlement and the subsequent deed. Sect. 4 of the Settled Land Act, 1890, is not to be read as providing that an assignment made by a tenant for life of settled land, in consideration of marriage or by way of family arrangement, is to be deemed one of the instruments creating the settlement for all the purposes of the Act. It is limited to the purpose of excluding the operation of s. 50 of the Settled Land Act, 1882, altogether. Upon a sale, therefore, under the powers of the Settled Land Acts, by a tenant for life who has made such an assignment, it is not necessary to appoint trustees of the settlement constituted by the original deed and the instrument effecting the assignment; but the trustees of the original settlement, having powers of sale, or appointed for the purposes of the Settled Land Acts, are competent to receive and give receipts for the purchase-money.

In re Tibbits' Settled Estates, [1897] 2 Ch. 149; *In re Meade's Settled Estates*, [1897] 1 I. R. 121; and *In re Marquis of Ailesbury and Lord Iveagh*, [1893] 2 Ch. 345, distinguished.

THIS was a summons under the Vendor and Purchaser Act, on behalf of the vendor, asking a declaration that the requisitions and objections of the purchaser in respect of the title to the hereditaments contracted to be sold, and in particular the 5th requisition, had been sufficiently answered by the vendor. The contract was dated July 27, 1897, and by it the purchaser agreed to purchase certain freehold property, subject to particulars and conditions of sale of which the 9th condition was as follows: "The property sold is a small portion of the estates over which the vendor, C. H. C. Du Cane, Esq., has the powers of a tenant for life since the death of the late tenant for life in 1889. In 1863 the whole of the estates then subject to the uses of the will of the said Peter Du Cane were charged with a jointure and portions and terms of years to secure the same; but in the year 1886, when the property was disentailed and resettled, a freehold estate in Essex, comprising over 5000 acres and having a gross annual value of over 3800*l.*, and a net one, after payment of all charges except the jointures mentioned below, of over 1300*l.*, was limited to trustees for a term of years upon trust to indemnify the property the subject of this sale with other property from the said jointures and portions, and this indemnity was extended in the following year to cover a further jointure then created. Of these incumbrances the jointures, amounting to 800*l.* per annum, now only affect the property sold. The purchaser will have the benefit of the indemnity, and shall assume that it is a sufficient security, and shall make no requisition in respect of the said jointures created in 1863 and 1887 respectively, and shall not require the property sold to be discharged or further indemnified from or against the same, or the terms created in 1863 to be surrendered."

The title, as disclosed by the abstract, shortly stated was as follows: Immediately before the execution of certain disentailing assurances dated September 8, 1885, the estate in question stood limited under the will of Peter Du Cane to the use of the late Sir Charles Du Cane for life, with remainder to his eldest son, who is the present vendor in tail, subject to a jointure of 500*l.* per annum in favour of Lady Du Cane, who was still living, and to portions in favour of younger children. That jointure was still in existence, but the portions had been paid off. By the disentailing assurances of September 8, 1885, the property was limited to such uses as Sir Charles Du Cane and the present vendor should by deed jointly appoint, and in default of appointment to the uses subsisting immediately before the execution of those assurances. By a deed dated April 22, 1886, which was the resettlement referred to in the 9th condition, Sir Charles Du Cane and the present vendor, in exercise of the joint power of appointment reserved to them by the disentailing assurances, irrevocably appointed that the property should thenceforth remain and be for such uses as Sir Charles Du Cane and the vendor should by deed jointly appoint, and, in default of such appointment, to the use of Sir Charles Du Cane for life by way of restoration of his former life estate under the will of Peter Du Cane, with remainder to the vendor for life, with remainder to his first and other sons, and with other remainders over; and by that deed a power was given to the vendor in certain events to charge the settled estates with certain moneys for his own benefit, and trustees were expressly appointed for the purposes of the Settled Land Act, 1882.

By a deed dated March 23, 1887, Sir Charles Du Cane and the vendor, in exercise of the joint power of appointment reserved to them by the deed of April 22, 1886, irrevocably appointed that the property should, from and after the death of Sir Charles Du Cane, inure to uses to secure to Lady Du Cane, in case she should survive Sir Charles Du Cane, a yearly rent-charge of 300*l.* in addition to the before-mentioned jointure of 500*l.* That was the second jointure referred to in the 9th condition. Subject thereto, it was also provided that the property should inure to the use of trustees during the life of the vendor upon certain trusts, being limited to the receipt of the income during the life of the vendor, and the disposal thereof at the discretion of the trustees in favour of all or any one or more of the vendor, his wife, children, and other members of the family; but it was declared that the appointment thereby made was subject and without prejudice to all uses and estates having priority under the settlement of April 22, 1886, over the estate for life thereby given to the vendor, and to all powers attached to such uses and estates, and to any exercise thereof, and also subject and without prejudice to the joint power of appointment given to Sir Charles Du Cane and the vendor by the same settlement, and subject and without prejudice to the powers which, but for that deed, would under the Settled Land Acts have been exercisable by the vendor, and which powers it was expressly stipulated were to be exercisable by them as if that deed had not been executed; and by that deed the vendor released the power of charging the settled estates for his own benefit which had been given to him by the deed of April 22, 1886. By a deed dated August 11, 1887, this power of charging was (by an exercise of the general power contained in the deed of April 22, 1886) restored to the vendor; under this power as so restored, and also under the deeds exercising the general power, various charges were subsequently created, but these had all been paid off before the date of the contract, and it is not necessary for the purposes of this report to state them in detail.

Sir Charles Du Cane died on February 25, 1889.

By a deed of February 24, 1894, the vendor settled the fee simple in remainder vested in him under the limitations in the deed of April 22, 1886.

Under these circumstances certain requisitions were made on the title. The 5th requisition was as follows: "Trustees for the purposes of the Settled Land Acts must be appointed either of the compound settlement constituted by the deeds of April 22, 1886, March 23, 1887, and August 11, 1887, or of the compound settlement constituted by these deeds and Mr. Peter Du Cane's will, and the deed of June 24, 1863, and the two deeds of September 8, 1885: *In re Tibbits' Settled Estates* (1) and *In re Meade's Settled Estates.* (2) Have trustees of either of these compound settlements been appointed, and, if so, what are their names?" The answer to that requisition was as follows: "The vendor is tenant for life under the abstracted settlement of April 22, 1886, and Major Du Cane and Mr. Tyndale White are the trustees thereof for the purposes of the Settled Land Acts, and no further appointment is required. They will as such trustees concur in the conveyance to the purchaser for the purpose of acknowledging the receipt of the consideration money."

The purchaser insisted upon the requisition, and the vendor then took out this summons.

Butcher, *Q.C.*, and *Spencer Butler*, for the vendor. In determining what constitutes a settlement under the Settled Land Act, 1882, it must be borne in mind that the object of the Act was to render the subject-matter of the settlement marketable: per Lord Halsbury in *Bruce* v. *Marquis of Ailesbury.* (3)

(1) [1897] 2 Ch. 149.

(2) [1897] 1 I. R. 121.

(3) [1892] A. C. 356, 361.

Sect. 2, sub-s. 1, defines a settlement as any deed under which any land or any estate or interest in land stands for the time being limited to or in trust for any persons by way of succession; it does not say "all deeds," and we submit that, wherever there is a deed limiting uses or trusts for a tenant for life and others in succession, that is the settlement; and if trustees are appointed for that settlement the Act is complied with, subject to the provisions of s. 20, sub-s. 2. If there are no overriding charges created by prior deeds, it is not necessary to go into the earlier title; and here, having regard to condition 9, the title previous to the settlement of April 22, 1886, is wholly immaterial.

Then how far is it necessary to go into subsequent dealings with the property? The deed of February 24, 1894, is a sub-settlement and need not be considered.

[*Buckley, Q.C.* . We do not claim that it must be treated as part of the compound settlement; we admit that *In re Knowles' Settled Estates* (1) is binding on this Court.]

Nor is it necessary to consider deeds executed in pursuance of powers contained in the settlement (e.g., the deed of August 11, 1887), unless by such deeds "estates, interests, and charges have been conveyed or created for securing money actually raised at the date" of such deeds: Settled Land Act, 1882, s. 20, sub-s. 2 (ii.).

The only difficulty is caused by the deed of March 23, 1887. Sect. 4 of the Settled Land Act, 1890, being retrospective, this deed, which is, we admit, an assignment by the vendor of his life estate by way of family arrangement, comes within sub-s. 1 of that section, and "is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of s. 50 of the Act of 1882." In order to see whether an assignment under this section is to be treated as part of a compound settlement under which trustees would have to be appointed, regard must be had to the object of the section. That object was simply, in the case of assignments by way of family arrangement, to get rid of the obligation imposed on the tenant for life by s. 50 of the principal Act of obtaining the consent of every assignee for value of the life estate; and as an assignment by the tenant for life under that section is not a deed forming part of a compound settlement, neither is an assignment under s. 4 of the Act of 1890 for the purpose of requiring the appointment of trustees. The original settlement is not altered, and the powers of the tenant for life and of the trustees of the settlement remain the same. The only settlement of which the vendor is tenant for life is the settlement of April 22, 1886; so the only settlement for which trustees are required to be appointed is that settlement. *In re Tibbits' Settled Estates* (1) appears to be opposed to this view so far as it goes; but that only shews that the Court made an appointment to get over the difficulty. Sect. 4 of the Act of 1890 is an enabling section, and cannot have meant to remove one restriction and impose another, for it cannot be supposed that the Legislature intended to stultify itself. If the Court is satisfied that the essentials of the Act have been complied with, it would be of great public benefit to say that nothing more need be done than has been done in this case, because if a tenant for life is obliged to include every subsequent dealing with the property it may make land unsaleable; for he may neither know nor have the means of knowing what the remaindermen may have done with the property.

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(1) (1884) 27 Ch. D. 707.

[STIRLING J. I do not feel pressed with that: *In re Knowles' Settled Estates* (2) gets over the difficulty as regards dealings by remaindermen.]

In re Marquis of Ailesbury and Lord Iveagh (3) is not an authority against any of our contentions.

[STIRLING J. In that case I thought that there might be more than one settlement, and that by appointing trustees of a compound settlement the difficulty which there arose as to a jointure could be avoided. In this case you avoided a similar difficulty by a special condition. I did not decide that where there is an outstanding jointure the tenant for life cannot sell subject to the jointure.]

As a matter of fact, in that case an order was subsequently

(1) [1897] 2 Ch. 149. (2) 27 Ch. D. 707. (3) [1893] 2 Ch. 345.

made in chambers by consent under which the trustees of the compound settlement were directed not to act, and the trustees of the deed of 1885 were directed to receive the purchase-money.

Buckley, Q.C., and *Clauson*, for the purchaser. First, as to the previous title regard must be had to the will of Peter Du Cane. Immediately after the execution of the deed of April, 1886, Sir Charles Du Cane, the father, was still tenant for life under the will, his original life estate having been expressly restored: *In re Wright's Trustees and Marshall* (1); and the vendor was tenant for life under a compound settlement made up of the will and the superadded limitations under the deed of 1886, and the death of the father made no difference: see s. 2, sub-s. 4, of the principal Act.

Secondly, as to the deed of March, 1887, and the effect of the Act of 1890. It is said that s. 50 of the principal Act provides that a tenant for life shall not sell over the head of his assignees for value, and that s. 4 of the Act of 1890 excepts from the benefit of s. 50 an assignee by way of family arrangement. But under that assignment there may come into existence a new cestui que trust who ought to be protected, and therefore s. 4 provides that the assignment "is to be deemed one of the instruments creating the settlement." The same expression, "creating a settlement," is used in s. 2, sub-s. 1, of the principal Act, where "settlement" is defined. This provision in s. 4 is not idle, because the original trustees may owe no obligation to the new cestui que trust; nor can any argument be founded upon the accident that the trustees appointed for the purpose of the Act under the deed of 1886 happen to be also the trustees of the deed of 1887, because they are not trustees appointed for the purpose of the Act under the later deed. The effect of s. 4 is that an assignee by way of family arrangement, though not in a position of such great advantage as an assignee for value, is nevertheless to have this advantage—that the assignment is to be one of the instruments of the settlement of which trustees are to be appointed under s. 2, sub-s. 8, of the principal Act.

(1) (1884) 28 Ch. D. 93.

In re Tibbits' Settled Estates (1) is an expression of opinion by North J. although, no doubt, it was an uncontested case. But we rely on the words of the statute.

Even apart from the Act of 1890, the deeds of March 23, 1887, and August 11, 1887, are part of the settlement; for, by an exercise of the joint power in the deed of April 22, 1886, these deeds altered the provisions of the settlement. All the three deeds must be read to discover what the uses are to which the land stands limited.

Butcher, Q.C., in reply. The original settlement may consist of one or more deeds executed contemporaneously. It would be dangerous to say that every deed creating new interests must be compounded. The words "compound settlement" do not occur in the Act of 1882 at all. In certain cases, no doubt, as is contemplated by s. 2, a settlement may consist of more than one instrument: *Vine* v. *Raleigh.* (2)

[Stirling J. I feel some doubt as to the deed of March, 1887, first, on account of s. 4, and, secondly, because it exercises the joint power so as to modify the original settlement.]

In re Knowles' Settled Estates (3) affords an answer to the argument upon s. 4.

[Stirling J. No; here the Legislature has interfered by dealing with assignments by the tenant for life on a different footing.]

The words are "is to be deemed," not "is to be." You must have regard to the object in view and the scope of the section, namely, to prevent persons who might otherwise interfere from interfering as assignees by virtue of s. 50 of the Act of 1882.

The object was to limit the class of persons who might interfere as assignees for value. It was also the object to enable the tenant for life to override interests subsisting or to arise under the settlement: see s. 20.

Sect. 4 was not intended to alter the general effect of assignments by the tenant for life. The scheme of the Act is that, no matter what the tenant for life does, his powers under the Act still remain exercisable.

(1) [1897] 2 Ch. 149. (2) [1896] 1 Ch. 37. (3) 27 Ch. D. 707.

The real question under s. 4 is, Was it intended to destroy, pro tanto, the powers of the trustees under the original settlement? There is nothing in the section which points to this. It would be a strange result if, so long as the tenant for life has executed no assignment, the powers of the trustees of the original settlement are not affected, but if he has they are destroyed.

There is nothing in the Act to oblige the Court to attribute to the Legislature so ridiculous an intention. The meaning of the section is that the trustees must not disregard the subsequent instrument, but not that it is to be one of the instruments creating the settlement for all purposes. Ordinary assignments by way of derivative settlement need not necessarily be compounded: *In re Knowles' Settled Estates.* (1)

[STIRLING J. That does not cover the case of an assignment by the tenant for life.]

Cur. adv. vult.

April 30. STIRLING J., after stating the facts, continued:—The question that has been argued before me is whether the purchaser's requisition has been sufficiently answered. By the contract the vendor contracted to sell an estate in fee simple, subject only to the jointures created in 1863 and 1887, as to which the purchaser has bound himself to make no requisition. The vendor purports to sell under the powers conferred by the Settled Land Acts as tenant for life under the settlement of April 22, 1886. The objection which is raised by the purchaser is not that the vendor is unable to exercise the powers of the Settled Land Acts, but that there are no proper trustees in existence who can receive notices which are required by the Act to be given by the vendor, and who can receive the purchase-money and give receipts for it. The question which I have to decide is whether it is necessary that such trustees should be appointed; and in this respect it appears to me that the case differs from those which were cited by the advisers of the purchaser in their requisition, namely, *In re Tibbits' Settled Estates* (2) and *In re Meade's Settled Estates* (3), where

(1) 27 Ch. D. 707. (2) [1897] 2 Ch. 149. (3) [1897] 1 I. R. 121.

the question was, as I conceive, simply this, whether a reasonable case had been made for the exercise of the jurisdiction which is conferred on the Court by s. 38 of the Settled Land Act, 1882, by the appointment of trustees for the purposes of the Act.

Now, in order that the vendor may make out his title there must in the first place be a settlement. A settlement is defined in s. 2, sub-s. 1, of the Act of 1882, and, reading the material part of it, it runs thus: "Any deed . . . . or other instrument . . . . under or by virtue of which . . . . any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement."

The observation which I make on that is that it is quite plain that one instrument may constitute a settlement, although it is to be admitted that several instruments may, under the same definition in the parts which I have not read, also constitute a settlement. Then does the deed of April 22, 1886, which the vendor alleges to be the settlement under which he sold, fall within the definition of the Act? The first limitation under that deed is to such uses as Sir Charles Du Cane and the vendor shall jointly appoint. By the exercise of that power the subsequent limitations might have been displaced, but the power has not, so far as material here to be stated, been so exercised; it is now spent, and, therefore, may be left out of consideration. Subject to that power, the next limitation is to the use of Sir Charles Du Cane in restoration of his life estate under the will of Peter Du Cane. The case of *In re Wright's Trustees and Marshall* (1) shews that by this means an effectual restoration of the old life estate was effected; but that life estate has now come to an end. Then in the deed there come limitations which did not exist prior to the execution of that deed, being in favour of the vendor for his life, with remainder to his first and other sons in tail male, with remainder over. It appears to me, therefore, that under that deed an estate or interest in land, which was either the fee simple itself, or, at all events, the remainder expectant on the

(1) 28 Ch. D. 93.

determination of the life estate of Sir Charles Du Cane under the will of Peter Du Cane, became, upon the execution of that deed, limited to the vendor and other persons by way of succession, and consequently at the time when that deed was executed it satisfied the requirements of the Settled Land Act, 1882, s. 2, sub-s. 1.

Now the deed of March 23, 1887, was executed under the joint powers of appointment reserved to Sir Charles Du Cane and the vendor, and it was admitted in argument, upon the authority of the same case of *In re Wright's Trustees and Marshall* (1), that the effect of it was to reserve to the vendor the powers conferred on him as tenant for life under the settlement of April 22, 1886, by the Settled Land Act, but at the same time to effect an assignment of that life estate to trustees by way of family arrangement within the meaning of s. 4 of the Settled Land Act, 1890. This being so, it is not disputed that the vendor is a tenant for life within the meaning of the Settled Land Act, 1882, s. 2, sub-s. 5. He can therefore under s. 3 sell, and under s. 20 convey, the settled land for all the estate and interest which was the subject of that settlement. That estate at the time of the settlement if not the fee simple in possession was the fee simple in reversion expectant on the determination of the life interest of Sir Charles Du Cane; but if it was reversionary the estate has fallen into possession, and all estates and interests and charges having priority to the settlement, except the two jointures specially provided for by the contract, have been got rid of; and so far there is no difficulty.

The Act, however, requires that the purchase-money, if not paid into court, shall, under s. 22, be paid to the trustees of the settlement, to whom also by s. 45 notice of the intended sale is to be given. Trustees are defined by s. 2, sub-s. 8, to be the persons, if any, who are for the time being under a settlement trustees with a power of sale of settled land, or with power to consent to or approve of such a power of sale, or if under a settlement there are no such trustees, then the persons who are for the time being declared trustees for the purposes of

(1) 28 Ch. D. 93.

the Act. As I have said, by the deed of April 22, 1886, certain named persons were declared to be trustees thereof for the purpose of the Act, and these persons are willing to concur in the conveyance and give a receipt for the purchase-money.

The objection taken on behalf of the purchaser is that these persons are not trustees who can accept notice and give receipts for the purposes of the present sale, it being contended that they are only trustees for the purposes of the settlement created by the deed of April 22, 1886, whereas two, or at all events, one other deed, that, namely, of March 23, 1887, and perhaps the deed of August 11, 1887, must be regarded as being, together with the deed of April 22, 1886, the settlement for the purposes of which trustees are to exist.

Then I have to consider the broad question whether new trustees must be appointed whenever a deed has been executed affecting the interests created by the original settlement, so that that settlement is no longer the only instrument under or by virtue of which land stands limited for the time being to or in trust for persons by way of succession, and, as a general rule, in my opinion, that question must be answered in the negative. Let me begin with considering some simple cases. Suppose that by an instrument dated January 1 in any year real estate is settled on A. for life, with remainder to B. in fee simple, and that the instrument either creates trustees with powers of sale, or expressly nominates persons to be trustees for the purposes of the Settled Land Acts. Suppose, further, on February 1 B. conveyed his remainder to C. in fee simple, or to C. for life, with remainder to B. in fee: are the powers of the trustees nominated in the January instrument affected by that alteration in the interests? I cannot see that they are. The estate still remains limited, if not under, at all events by virtue of, the January instrument, to persons by way of succession, and, though s. 38 of the Act may, and, as I think, does, in a proper case enable the Court to appoint trustees of a settlement made up of the instruments of January and February, or any other instruments, yet I can find nothing (I speak of the Act of 1882) which deprives the trustees for the purposes of the Act under the January instrument of the power of receiving and giving receipts for the purchase-money. This view is supported by the decision of Pearson J. in *In re Knowles' Settled Estates.* (1)

It may further be observed that to hold otherwise would cause great practical difficulty. The tenant for life as a general rule knows nothing of the dealings of the remaindermen with their interests, and has no means of discovering what they are, and it might in many cases be almost impossible to ascertain correctly what those dealings have been, and consequently to obtain the appointment of trustees of a settlement made up of all the instruments by which any estate or interest under the original settlement, other than that, of course, of the tenant for life himself, has been affected. This last difficulty does not arise when the new interest is brought into existence by the tenant for life himself. Suppose, for example, that under a power contained in a settlement the tenant for life has charged portions on the estate in favour of his younger children: of course, he may then be taken to know the particulars of the instrument executed by himself; but s. 20, sub-s. 2, of the Settled Land Act, 1882, appears to me to shew that he may sell the estate discharged from those portions so long as they have not been actually raised, and there is nothing in the Act to shew that the framers of it contemplated that by a charge of portions persons who for the time being were trustees, either with powers of sale or expressly named for the purposes of the Settled Land Act, would be deprived of the power of receiving and giving receipts for the purchase-money, and that resort should be had to the powers conferred on the Court by s. 38 before a sale can be completed. Nor do I see any reason in the nature of things why it should be so held. In fact, I have so decided with reference to the exercise of a power of jointuring in the case of *In re Keck and Hart's Contract* (2), and on further consideration I adhere to that decision.

If the dealing which gives rise to the new interest be an alienation by the tenant for life, then the special provisions of s. 50 of the Settled Land Act, 1882, come into operation. Under that section the powers conferred by the Act remain exercisable by the tenant for life, but so as not to prejudice the rights of an assignee for value, which cannot be affected without his consent. The result is that upon a sale by a tenant for life who has alienated for value the purchaser is in general entitled to ask for evidence of the consent of the assignee. The provisions, however, of this section, being for the benefit of the assignee, might, as I conceive, be waived by himself; and if the instrument of assignment contains a consent by the assignee beforehand, all the powers of the tenant for life under the Act of 1882 would remain. It appears to me that the instrument of 1887, with which I have here to deal, contains such a consent on behalf of the trustees to whom the assignment is made; but the important point to remember in the present case is this—that, whether this be so or no, there does not seem to me to be anything in the Act of 1882 to shew that the powers of the trustees for the purposes of the Act are in any way affected, or contemplated as affected, by that assignment. The effect of the section, as I have said, is simply to impose on the vendor, the tenant for life, the duty of obtaining the consent of his assignee.

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(1) 27 Ch. D. 707.

(2) [1898] 1 Ch. 617.

Now, by the Act of 1890 the provisions of the Act of 1882 have been somewhat modified. Sect. 4 provides this: "Every instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement, is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of s. 50 of the Act of 1882." Then it provides that "this section is to apply and have effect with respect to every disposition before as well as after the passing of this Act, unless inconsistent with the nature or terms of the disposition."

The first remark which I have to make on that is that it applies only to a limited class of assignments, being assignments or charges in consideration of marriage, or as part of, or by way of family arrangement; so that as regards assignments for value, either out and out, or by way of security for money advanced, the law as it previously stood remains—

that is to say, in those cases the powers of the trustees still remain unaffected, and the obligation remains on the part of the tenant for life to procure the consent of the assignee for value. But no doubt—and that creates the real difficulty in the present case—there is a change made by the Act as regards assignments as part or by way of family arrangement, under which category the present deed with which I have to deal, of March, 1887, is to be regarded as coming; and if the section is to be read as providing that under the settlement such an assignment is to be deemed one of the instruments creating the settlement for all the purposes of the Act, which is the contention on behalf of the purchaser, then it does seem to me that it follows as a necessary consequence that trustees should be appointed of the settlement made up of the original settlement and that additional instrument. But the question which I have to consider is, Is it necessary to give that wide effect to the language of this section? The contention on the other hand, on behalf of the vendor, is that the section is limited to the purpose of excluding the operation of s. 50 of the Act of 1882, and that is borne out by the concluding words that the instrument "is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of s. 50 of the Act of 1882." It is not a positive enactment that this assignment shall be one of the instruments creating the settlement, but only that it shall be deemed to be; and it seems to me that the language of the Act is satisfied by the limited construction which is placed on it on behalf of the vendor, and that it does not require me to hold that this section makes the assignment an instrument creating the settlement for all the purposes of the Act.

I found myself in coming to that conclusion on the last words of the section which I have just read, and also upon the consideration that the difficulty which was intended to be met by the section, and the only difficulty, as far as I can see, was the necessity of obtaining the consent of assignees under s. 50 of the Act of 1882. I cannot see that for any other purposes connected with the Acts the section was called for. On these grounds I think that the vendor is in the right, and that the declaration which is asked for by the summons ought to be made, and that the costs ought to follow the event.

STIRLING J.
1898
Du Cane and Nettlefold's Contract, *In re.*

Solicitors: *Nicholl, Manisty & Co.; E. Bromley.*

G. A. S.

ASTBURY *v.* ASTBURY.

[1897 A. 993.]

STIRLING J.
1898
April 27, 28; *May* 4.

Limitations, Statutes of—Mortgage—Arrears of Interest—Acknowledgment by one of two Executors and Trustees—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 42.

An acknowledgment by one of two executors and devisees in trust of real estate against the wishes of the other that more than six years' interest is due on a mortgage created by their testator cannot be treated as the valid act of the two in their capacity of trustees, and is not a good acknowledgment within s. 42 of the Real Property Limitation Act, 1833.

THIS was an action for foreclosure.

Upon taking the account under the foreclosure order nisi the question arose as to what arrears of interest the plaintiff, Sarah Astbury, was entitled to recover, the interest being more than six years in arrear.

On March 16, 1885, Martha Swinton deposited with the plaintiff the title-deeds relating to certain hereditaments belonging to her by way of equitable mortgage to secure a sum of 500*l.* with interest thereon at 5 per cent., and in March, 1886, she paid the interest for the first year. Martha Swinton died on November 26, 1887, having by her will, made on October 28, 1882, appointed the defendants Samuel Astbury and James Newrick executors and trustees, and devised and bequeathed to them her real estate and residuary personal estate upon certain trusts. After her death the validity of this mortgage was disputed, and by an order of May 18, 1897, made on the trial of an issue in an action of *In re Swinton, Newrick* v. *Astbury*, the Court declared that the title-deeds of the property in question were on March 16, 1885, deposited by the deceased with the said Sarah Astbury to secure the said advance of 500*l.* with interest thereon at 5 per cent., and that such sum and interest thereon at the said rate from March 16, 1886, were still due and owing on the security.

On the following day, May 19, 1897, the defendant Samuel Astbury, who was a half-brother of the plaintiff, signed a document whereby, after describing himself as executor of Martha Swinton, deceased, and also a devisee of the real estate of the said Martha Swinton, he acknowledged the deposit of the title-deeds as above mentioned, and that the whole of the said sum of 500*l.*, and also interest thereon at the said rate from March 16, 1886, were then due and owing from the said M. Swinton to the said Sarah Astbury, and that the said principal sum due and the said arrears of interest were secured by the deposit of the said deeds, and promised as executor of the said M. Swinton, deceased, and devisee of her real estate, to pay to the said Sarah Astbury the said 500*l.* and interest thereon at the rate aforesaid from March 16, 1886; and he concluded by stating that he signed the document for the purpose of defeating the Statutes of Limitation.

This document was signed without the concurrence of the defendant Newrick, and with the knowledge that he intended to claim that six years' interest only was recoverable.

On July 26, 1897, the plaintiff took out an originating summons, under Order LV., r. 5*a*, against the defendants for foreclosure; and on November 17, 1897, an order for foreclosure was made in the common form.

Austen-Cartmell, for the defendant Newrick. Primâ facie in a foreclosure action only six years' arrears of interest are recoverable: Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42 (1); *Hunter* v. *Nockolds* (2); *Sinclair* v. *Jackson*. (3)

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(1) Sect. 42 provides as follows: "No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent . . . . shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent."

(2) (1850) 1 Mac. & G. 640.

(3) (1853) 17 Beav. 405.

The question is whether there has been an acknowledgment sufficient to take the case out of the statute. Assuming that one trustee can give an acknowledgment which would bind the land, he cannot do so against the express dissent of his co-trustee. Although an executor is not bound to plead the Statute of Limitations, and may pay a statute-barred debt, yet the leaning of the Courts is against allowing him to pay such debt against the wishes of his co-executor: *Midgley* v. *Midgley*. (1) As was pointed out by Romer J. in that case, the exception of the Statute of Limitations to the general rule that it is the duty of an executor to raise all proper defences is an anomaly which ought not to be extended. Similar reasoning applies to a case like the present. Where one executor or trustee knows that his co-executor or co-trustee is going to raise the defence of the statute to a claim against the estate, it is not competent for him to give an acknowledgment which will take the case out of the statute.

Further, upon the construction of this particular statute, I submit that the acknowledgment is not sufficient. It must be signed by the person by whom the interest was payable or his agent. Samuel Astbury cannot for this purpose be considered as agent of himself and his co-trustee. The person by whom the interest is payable is in this case a composite person consisting of both the trustees together. The trustees have no separate existence with regard to the equity of redemption, and although the two together could have made a good acknowledgment, one alone cannot. This case falls within the principle of *Bolding* v. *Lane*. (2) No doubt, there are cases under this Act where an acknowledgment by a person interested in the estate has been held binding on all parties: *Chinnery* v. *Evans* (3); *In re Fitzmaurice* (4); *Lord St. John* v. *Boughton* (5); but the question is the same in each case, namely, whether the acknowledgment is signed by the person really representing the estate, and here one trustee alone does not represent the estate.

(1) [1893] 3 Ch. 282.
(2) (1863) 1 D. J. & S. 122, 132.
(3) (1864) 11 H. L. C. 115.
(4) (1864) 15 Ir. Ch. Rep. 445.
(5) (1838) 9 Sim. 219.

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In re Macdonald (1), which may be cited against my contention, does not affect the statute under consideration; it was a decision upon Lord Tenterden's Act only, and it was confined to executors.

Micklem, for the plaintiff. The plaintiff is entitled to the full arrears of interest. It is well settled that an executor may pay a statute-barred debt, the reason being that to plead the statute has been thought by many judges to be unconscionable: *In re Rownson* (2); and your Lordship has held that an acknowledgment by one of several executors, although not personally binding on his co-executors, binds the testator's estate: *In re Macdonald* (1); and see *In re Hollingshead.* (3) Those cases are in my favour, subject to the question whether the dissent of the co-executor makes any difference. Upon that point there is no precise authority, but it has been held that one executor may release a debt due to the estate and settle an account notwithstanding the dissent of his co-executors: *Smith* v. *Everett* (4); Williams on Executors, 9th ed. p. 817.

[Stirling J. referred to *Lepard* v. *Vernon.* (5)

Austen-Cartmell referred to *Sneesby* v. *Thorne* (6) and *In re Ingham.* (7)]

In *Midgley* v. *Midgley* (8) the point was left open. I submit that the balance of authority is in favour of the view that the acknowledgment is sufficient notwithstanding the dissent of the co-executor.

If, then, the plaintiff were proceeding against the estate of the testatrix for debt, she would be entitled to recover the full amount of arrears, and the only question is whether she can get the same relief in these foreclosure proceedings. That turns upon the construction of s. 42 of the Real Property Limitation Act, 1833. Upon that I submit, first, that these trustees are persons by whom the interest is payable within the section: *Lord St. John* v. *Boughton* (9), *Toft* v. *Stephenson* (10), which were decided upon a similar provision in s. 40;

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(1) [1897] 2 Ch. 181.
(2) (1885) 29 Ch. D. 358, 362.
(3) (1888) 37 Ch. D. 651, 658.
(4) (1859) 27 Beav. 446.
(5) (1813) 2 V. & B. 51.
(6) (1855) 7 D. M. & G. 399.
(7) [1893] 1 Ch. 352, 360.
(8) [1893] 3 Ch. 282.
(9) 9 Sim. 219.
(10) (1851) 1 D. M. & G. 28.

secondly, that part payment or acknowledgment by one of the parties liable to pay is binding on all parties: *Roddam* v. *Morley.* (1) There it was held that payment by a devisee for life of interest on a specialty debt of the testator's in which the heirs were bound was an acknowledgment by the party liable, and kept the debt alive against the remaindermen. It is true that that was a decision upon 3 & 4 Will. 4, c. 42, but the Legislature intended the effect of an acknowledgment to be the same in both Acts, and the language is not materially different: *Pears* v. *Laing.* (2) *Chinnery* v. *Evans* (3) proceeds upon the same principle, and *Bolding* v. *Lane* (4) is there explained and distinguished: see Darby and Bosanquet's Statutes of Limitation, 2nd ed. p. 230.

Austen-Cartmell, in reply, referred to *Richardson* v. *Younge* (5) and *In re England.* (6)

Cur. adv. vult.

May 4. STIRLING J., after stating the facts:—The question is whether the acknowledgment signed by Samuel Astbury on May 19, 1897, is effectual against the other defendant, who claims the benefit of the Statute of Limitations. The statute with which I have to deal is 3 & 4 Will. 4, c. 27, s. 42. [His Lordship read the section.] I may observe here that this section, differing in this respect from s. 40, makes no mention of part payment, so that it would seem that part payment of an instalment of interest would not prevent the operation of the statute as to the balance.

For the purposes of the present judgment I assume, without deciding, that one executor may pay a statute-barred debt notwithstanding the dissent of his co-executor; and also that one executor may give a valid acknowledgment of a statute-barred debt notwithstanding such dissent. Such powers, if they exist, must depend on the legal right of each executor to dispose of the estate of the testator so as to bind the others. No such right exists in the case of trustees: all trustees must concur in the exercise of powers conferred on them with reference to the trust estate. Although, therefore, the acknowledgment of May 19, 1897, may have been effectual on the part of Samuel Astbury in his capacity of executor, and with reference to the personal estate of the testator, I think it cannot be regarded as a valid act on the part of both trustees with reference to the real estate.

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(1) (1857) 1 De G. & J. 1, 18.

(2) (1871) L. R. 12 Eq. 41, 53.

(3) 11 H. L. C. 115.

(4) 1 D. J. & S. 122, 132.

(5) (1871) L. R. 6 Ch. 478.

(6) [1895] 2 Ch. 100.

The question, then, is whether, it being assumed to be effectual as regards the personalty, it was also effectual to prevent the operation of the statute 3 & 4 Will. 4, c. 27, s. 42, as regards the land.

The only decision on this particular clause is *Bolding* v. *Lane* (1), in which it was held that an acknowledgment by a mortgagor of more than six years' arrears of interest being due upon a first mortgage does not preclude a puisne mortgagee from relying on the statute. Lord Westbury L.C., reversing the decision of Stuart V.-C., there says: "The Vice-Chancellor apparently holds that the words in the 42nd section, viz., 'the person by whom the same was payable,' mean the person who was liable at law to pay the interest under the contract, that is the mortgagor or his representative, and accordingly he considers the second mortgagee as not included within those words." Then, after some further observations, the Lord Chancellor says this: "In truth, these words of the statute, far from having the limited construction of the Vice-Chancellor, appear to have been selected as a description capable of including not only every person liable to be sued at law, but every person who, having an interest in the land sought to be charged, might be properly sued as a defendant in a suit in equity, brought to enforce payment of the principal and interest out of such land. If this be so, it follows as a necessary consequence, that it was not the intention nor is it the effect of the section to give to the mortgagor or other person, who is 'by law compellable to pay the interest,' a statutory power to deprive, by his acknowledgment given to a prior incumbrancer, the subsequent incumbrancers of the benefit of the statute, which would be monstrously unjust, but to enact a plain and simple rule that no person having a charge on lands shall recover more than six years' interest on such charge against any other person having an interest in the lands without an acknowledgment in writing, signed by such person or by some former owner from whom the interest is derived." Now if that be taken literally as an interpretation of the statute, then an acknowledgment by an executor (who has not by virtue of his office an interest in real estate) does not fall within it; but it may be thought, having regard to some decisions which I am about to mention, that the words of the Lord Chancellor must be taken with some qualification. However that may be, the decision, which is binding upon me, appears to be in favour of the view that an acknowledgment made by an executor is not effectual to keep alive the debt against the devisee of the real estate, supposing him to be a different person. If the acknowledgment of the mortgagor who has an interest in the land does not prevent a mortgagee from claiming the benefit of the statute, why should the acknowledgment of the executor (who as such has no interest in the land) be more effectual?

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(1) 1 D. J. & S. 122, 132.

This seems to me to be in accordance with the decisions with reference to the effect of payment of interest under various Statutes of Limitation.

It was held by the House of Lords in *Chinnery* v. *Evans* (1) that payment of interest on a mortgage comprising several estates by a receiver appointed in a mortgagee's action of the rents of one of them operated (under s. 40 of 3 & 4 Will. 4, c. 27) to keep alive the mortgage debts against the others. It was also held in *Roddam* v. *Morley* (2) that payment by a tenant for life of devised real estate of interest on a specialty debt in which the heirs were bound was sufficient (under 3 & 4 Will. 4, c. 42, s. 5) to keep the debt alive against the remainderman; and a similar decision was given in *In re Hollingshead* (3) with respect to payment of interest on a simple contract debt, the relevant statute being 21 Jac. 1, c. 16. It will be observed that in all these cases the position or interest of the person making the payment was such that he might fairly be held to represent the other persons interested in the land.

(1) 11 H. L. C. 115.

(2) 1 De G. & J. 1.

(3) 37 Ch. D. 651.

On the other hand, it was held by Turner V.-C. in *Fordham* v. *Wallis* (1) that the payment of interest on a debt of a testator by the executors, who were also devisees in trust of his real estate, although it kept alive the debt against the personal estate, did not have the same effect against the real estate, the relevant statute being again 21 Jac. 1. c. 16. The Vice-Chancellor there followed the case of *Putnam* v. *Bates* (2), and referring to that case he says: "The case rests upon the decisions in *Atkins* v. *Tredgold* (3) and *Slater* v. *Lawson* (4), and the principle of those cases was this—that one party was not to be bound by the admissions of another, except in cases of continuing joint contract. This principle is surely founded in justice. Apart from purely legal considerations, it cannot, I think, be doubted, that it ought not to be in the power of any person by his admissions to revive a right against another, which, but for that admission, would have been wholly extinguished, as was the case in *Channell* v. *Ditchburn.* (5) But then it is said, that this principle ought not to have been applied to cases such as *Putnam* v. *Bates* (2) and the present case; that the liability of the real estate was so connected with the liability of the personal estate as to preclude the application of the principle; but I think that what we have to consider in these cases is, the act of the person, and not the position of the estate; for the existence or non-existence of the demand depends upon the act of the person, and not upon the relative liability of the property. I adopt, therefore, the principle of *Putnam* v. *Bates.*" (2) Then, after considering various other grounds on which it was sought to distinguish that case, he deals with the fact that the executors were also trustees, and as to that he says: "Although the executors and the trustees are the same persons, they fill wholly different characters; and it is, therefore, as I think, necessary upon this point to examine the character in which the payments were made. Looking at the evidence with that view, I feel no doubt that these payments were made by the executors in their character of executors, and in that character only; and I am of opinion, therefore, that the real estate is not affected by those payments."

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(1) (1852) 10 Hare, 217, 228, 230.
(2) (1826) 3 Russ. 188.
(3) (1823) 2 B. & C. 23.
(4) (1830) 1 B. & Ad. 396.
(5) (1839) 5 M. & W. 494.

It was also held by Lord Chelmsford L.C. in *Coope* v. *Cresswell* (1), reversing the decision of Kindersley V.-C., that payment of interest on a specialty debt by the executors of the debtor was not sufficient (under 3 & 4 Will. 4, c. 42, s. 5) to keep the debt alive against the devisees of the real estate.

Being of opinion that the acknowledgment of May 19, 1897, cannot be treated as the valid act of both trustees with reference to the real estate, I also think that, even if effectual so as to give rise to rights of the plaintiff against the personal estate, it cannot prevent the operation of 3 & 4 Will. 4, c. 27, s. 42, against the real estate; and that only six years' arrears of interest are recoverable in the present action.

Solicitors: *Pritchard, Englefield & Co.; E. Flux & Leadbitter, for H. W. G. Garnett, Crewe.*

H. B. H.

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(1) (1866) L. R. 2 Ch. 112.

KEKEWICH J.

1898

Feb. 19.

LANCHBURY *v.* BODE.

[1896 L. 1500.]

Custom—Parish Bull and Boar—Parson—Great Tithes, Charge on—Inclosure Act—Allotment of Lands in lieu of Tithes—Transfer of Liability to Custom.

Where, under an Inclosure Act, lands have been allotted "in satisfaction and discharge of" the great tithes, the burden of keeping up a custom that the parson as owner of the great tithes shall provide and keep a bull and boar for the common use of the parishioners is not, in the absence of express words in the Act to that effect, shifted to the allottees of those lands.

THIS action was brought by the plaintiffs on behalf of themselves and all other the parishioners of the parish of Haddenham, Buckinghamshire, against Jane Elizabeth Bode, widow, as the owner of lands allotted by statute in lieu of the great tithes of the parish, claiming a declaration "that it was an ancient custom of the parish of Haddenham that the parson, as the owner of the great tithes of the said parish, and as a charge thereon, should keep within the said parish a common bull and a common boar for the common use of the kine and sows of the parishioners at any time for the increase of calves and pigs within the said parish, and that the defendant, as the present owner of the lands allotted in lieu of the great tithes, is bound to perform the said custom: an injunction to restrain the defendant her agent and servants from omitting to provide and keep a bull and a boar in accordance with the said custom, or from otherwise infringing the same: and damages." The plaintiffs alleged in their statement of claim that "from time immemorial it has been a custom in the parish of Haddenham, in the county of Bucks, that the parson of the parish, as the owner of the great tithes thereof and as a charge thereon, should provide and keep in the said parish a common bull and a common boar for the common use of the kine and sows of the said parishioners at any time."

In the year 1312 the parsonage or rectory of Haddenham was appropriated by the Priory of Rochester, which was dissolved in the year 1540; and subsequently, in 1542, the parsonage or rectory, with the parish church, glebe, tithes, and property belonging thereto, was granted by King Henry VIII. to the Dean and Chapter of Rochester and their successors. Under an Inclosure Act of 11 Geo. 4, session 1830, intituled "An Act for inclosing land and extinguishing tithes in the Parish of Haddenham in the County of Buckingham," and an award made thereunder in 1834, certain lands were allotted to the dean and chapter in satisfaction and discharge of the great tithes; and in 1866, by an Order in Council, the parsonage and rectory, with the parish church, &c., and the allotted lands, were transferred to the Ecclesiastical Commissioners, who, in 1881, sold the greater part of the allotted lands to Henry Bode, the defendant's late husband, subject to all charges and duties thereon or in respect thereof. Henry Bode died in 1892, having devised the lands to his widow, the defendant. The plaintiffs then alleged that "the said bull and boar were always provided and kept by the said priory, the said dean and chapter, and the Ecclesiastical Commissioners respectively, or their respective tenants on their behalf, and afterwards by the said Henry Bode; but the defendant has, although requested by the plaintiffs so to do, refused to provide and keep the same, and the plaintiffs who, as two of the parishioners, are entitled to the use of the said bull and boar for their cows and sows, have thereby sustained damage." The plaintiffs then claimed relief in the form above mentioned.

In her defence the defendant denied the existence of the custom, and asserted that since the appropriation by the Priory of Rochester no parson or rector had resided in the parish or kept a bull or a boar therein, and that the dean and chapter had never performed or been required to perform this duty with respect to the parish. She also maintained that there was and always had been a sufficient supply of bulls and boars in the parish and the adjoining parishes, and that neither the plaintiffs nor any other inhabitants of the parish had suffered any damage for want of such animals. She suggested that the alleged custom probably arose from the fact that one John Franklin, a large landowner in the neighbourhood, who died in 1862, had held the lands allotted in lieu of tithes on a renewable lease from the dean and chapter for twenty-one years, and, being interested in cattle breeding generally, kept a bull and boar for his own benefit on his estate, though not on the lands in question, and that this must have led to the erroneous impression that he was under a legal obligation to keep a bull and a boar; but that in 1865 the then vicar of the parish ascertained from the dean and chapter that neither the lease to Franklin nor any previous leases contained any reference to the alleged custom. She further contended that, even if the alleged custom existed, she was under no obligation to comply with it, not being the parson of the parish nor in receipt of the great tithes.

The action now came on for trial. A number of aged parishioners were called on the part of the plaintiffs as witnesses with a view to proving the existence of the custom. From the evidence it appeared that since the award to the dean and chapter in 1834 it had been the practice among their lessees, or some of them, to keep a "tithe bull" or a "tithe boar" upon "tithe land," though sometimes they were kept on land which was not "tithe land"; and also that Bode, after his purchase from the dean and chapter in 1881, kept a bull and a boar upon the purchased lands; but, as his Lordship held, the evidence failed to establish that these acts had been done in pursuance of any such ancient custom as was alleged. None of the leases from the dean and chapter contained any notice of the alleged custom, nor any covenants by the lessees to comply with it; nor was there any evidence to shew that the liability to the alleged custom had ever been admitted by the dean and chapter or any of their successors or lessees. Reliance was also placed by the plaintiffs upon s. 37 of the above-mentioned Inclosure Act of 1830, which provided that the commissioners under the Act should allot to the Dean and Chapter of Rochester and their lessee and successors, and to the vicar of the parish of Haddenham, "for and in lieu and satisfaction of and for the several and respective rectorial and vicarial tithes yearly arising, issuing, and renewing out of all and every" the common fields and waste grounds in the said parish and out of the lands held in severalty within the same parish which were "subject to tithes," parcels of the said commonable lands, which parcels "shall be in full satisfaction and discharge of and for the said several rectorial and vicarial tithes arising, issuing, and renewing from and out of" the said commonable lands and the said lands held in severalty in the said parish. Then s. 58 enacted that the lands and hereditaments allotted "for or in respect of any freehold lands, or for or in respect of any right of common, or any right or interest appurtenant or appendant to such freehold lands, shall from and after the execution of the award be deemed to be freeholds"; and that the lands allotted in respect of copyhold or leasehold lands, or for or in respect of any right of common, or any right or interest appurtenant or appendant to any such copyhold and leasehold premises respectively, should from and after the execution of the award be deemed to be copyhold or leasehold respectively, "and shall be held as such by and under the same tenure, rents, payments, fines, heriots, customs, and services as the freehold, copyhold, and leasehold lands respectively for which such allotments shall be made are now or shall be held immediately before the execution of the said award." Neither the Act, nor the award under it to the dean and chapter, contained any express reservation or notice of the alleged custom. The evidence shewed that a search through the records of the dean and chapter and of the Ecclesiastical Commissioners had failed to discover any reference to the alleged custom.

Bramwell Davis, Q.C., and *Dunham*, for the plaintiffs. The ancient custom we allege is a perfectly good custom at law: Viner's Abr. 2nd ed. vol. vii. p. 181, Tit. "Customs." It is also alluded to by Shakespeare in *Henry IV.*, Part II., act ii., scene 2, and in the last chapter of Sterne's "Tristram Shandy."

[*Warrington, Q.C.*, for the defendant. We admit that the custom itself is a good custom, but we say it is not established in this case.]

We contend that the evidence is sufficient to establish the existence of the ancient custom in this parish; and the question is whether it was extinguished by the Inclosure Act of 1830. We submit that the intention of the Act was simply, as is shewn by s. 37, to exchange the tithes for the lands, and that these allotted or substituted lands were to remain subject, in the hands of the allottees, to the same liabilities as the tithes. This seems clear from s. 58, which says that from and after the award the allotted lands should be held by and under the same "heriots, customs, and services" as the "freehold" lands for which the allotments should be made had been held: and "freehold lands" would include tithes. But apart from the Act, upon principle, the custom should be treated as still subsisting and attaching to the allotted lands in the absence of any special provision in the Act specifically extinguishing that custom. The parishioners, therefore, are entitled to claim this custom as a right appurtenant to the allotted lands within the parish.

Warrington, Q.C., and *Sir R. J. Cust*, for the defendant, were not called upon. (1)

Kekewich J. The custom alleged in the statement of claim is a good custom in law. This is what is alleged: "From time immemorial it has been a custom within the parish of Haddenham, in the county of Bucks, that the parson of the parish, as the owner of the great tithes thereof and as a charge thereon, should provide and keep in the said parish a common bull and a common boar for the common use of the kine and sows of the said parishioners at any time."

Of course the custom being properly alleged as a legal custom, the first question is, is it proved as a matter of fact? In the view I take of the case it is unnecessary to answer that question either in the one way or the other. I shall assume that the evidence is sufficient to establish the custom as alleged.

It is imposed upon the parson of the parish as the owner of the great tithes, and it follows that if the great tithes were assigned to some other person or corporation, the liability would have gone as an incident to those tithes. That I assume. That brings us down to the year 1830, down to which time the tithes had been in the ownership of the Dean and Chapter of Rochester. In 1830 an Act of Parliament was passed which may be conveniently described as an Inclosure Act. The general purport of it was to settle all commonable rights, and rights and interests of all kinds in land, by means of an inquiry followed by an award, the result of which would be to allot lands in satisfaction of all rights existing up to that time. It is unnecessary to go into the Act at length. All I have to consider is that part of it which deals with the ownership of the great tithes. That is s. 37. [His Lordship read the section.] Now, what is the effect of that section? The Dean and Chapter of Rochester were to be compensated for the tithes proposed to be taken from them. The compensation was to go to them and their lessees. They were, it appears, in the habit of demising the tithes for terms of years. It would have been iniquitous to give compensation to the dean and chapter and not to their lessees; the omission to do so would certainly have led to litigation under their covenants. It was necessary to give the lessees also satisfaction. That is therefore provided for by the Act. But the mere fact that the lessees were provided for in that way does not appear to be otherwise of importance upon the question I have to consider. The case of the plaintiffs is, that without more than what I have said, the burden of keeping these animals for the use of the parish was by the Act shifted from the tithes to the land substituted for them, and notwithstanding that the tithes were thereby satisfied and discharged.

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(1) As to the custom, see *Yielding* v. *Fay*, (1594) Cro. Eliz. 569, and *Waples* v. *Bassett*, (1693) 4 Mod. 241, in both of which cases the action was against the parson himself.

The first observation which occurs to me is this. This is an ancient custom, to be proved by such evidence as the Court is in the habit of receiving on such a point; that is to say, the evidence of old people, of documents, and of user. When the question comes to be one of a charge on land there is quite a different question to be considered. A charge on land is proved by producing the original conveyance creating the charge, unless the case is one in which you can presume a lost grant; but when the alleged charge is one going back, as here, only to the

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year 1830, one expects to find something in the nature of an express charge; and it is almost incredible to suppose that the Legislature intended, when the land was allotted, that it should be taken subject to a charge which was not expressed. That appears to me to be of itself a sufficient answer to the argument that the lands were to be taken subject to this charge. But the lands were to be held "in full satisfaction and discharge" of the tithes. Now the tithes are one indivisible whole: the right to collect and receive them was one entire and indivisible right vested in the dean and chapter, and must have been conveyed by them as a whole and not in part; but the lands are held on a different basis, for they can be conveyed and demised in separate lots. As a matter of fact, the defendant is not the owner of all these lands allotted in substitution for the tithes, but only of a part of the lands. It is said that, as the owner of part of the lands, she is liable to the custom. If so, the position must go to this, that the owner of each and every part of the lands, for instance, of one acre, is subject to the custom. It cannot be said that the owner of the large part is liable to the custom, and the owners of other parts are not. If the whole of these lands is subject to the custom, it must follow that the owner of every piece of the lands is liable to the custom. In that case it might be that the defendant would be entitled to contribution from the owners of other parts of the lands; but that is a conclusion which ought not to be arrived at without much stronger reasons being given for it than have been urged before me.

I am not aware of any precedent of the owner of land being held entitled to contribution in the case of such a custom as this. Take the analogy of a lay rector entitled to a pew in the chancel. Suppose the lay rector has lands allotted to him in lieu of his rights to the pew, can the right to have a pew be parcelled out among the several subsequent owners of the lands? Can you divide the right among several owners? Are they all to have pews, or one or more? I believe the question, though often mooted, has never been judicially decided, and therefore, until it actually arises, I shall not express an opinion upon it; but I think, upon principle, that it falls within the same lines as a case of this kind. The person who wishes to occupy the pew must claim by reason of some rectorial right, and the owner of lands allotted in lieu of tithes cannot claim any rectorial right. If he cannot do so, that seems to be a conclusive answer to the plaintiffs' case under s. 37.

Two points made in favour of the plaintiffs must be noticed in passing. The first depends on s. 58, but in my opinion the words do not fit this case at all, and no more need be said about it. The other point is of a different character. The bull and the boar were kept and were available for some time after the award. Apparently they were kept as before, and by those persons who would have kept them, if the custom had been in fact shifted from the ownership of the tithes to the ownership of the substituted lands. But if my view of s. 37 is right, we have now to deal with the setting up of an entirely new custom—a custom entirely different from a custom established by ancient user, a custom said to have been established in 1834, the date of the award. What is attempted to be shewn is, that there was a fulfilment of an obligation, and because there was a liability already existing. No doubt the liability was insisted on by some persons and was not contested by others, and Mr. Bode himself declined to contest it. But there is nothing to shew that Bode, when he did not contest his liability, admitted it. It would, to my mind, be monstrous to say that because a man will not contest a claim he must therefore be taken, as a matter of law, to have admitted it. Experience goes to shew that many persons submit to a claim they believe to be unjust rather than go into litigation. I will not assume that, because Bode did not dispute his liability, therefore the custom is established against him. All the evidence shews that many persons thought the custom ought to be kept up after the award, and wished to keep it up, assuming that the liability shifted from the tithes to the substituted lands. They insisted upon the obligation being performed as before; but that does not establish the liability, and I do not see that anything was done on the part of the dean and chapter or their successors, including Bode, to shew

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that the liability still exists. If it could be proved that Bode, being the owner in fee of these lands, had distinctly admitted this liability, it is possible that he and his successors might have been fixed with the liability; but it would take a good deal of evidence to prove that the owner in fee has burdened his estate in this way.

I am therefore of opinion that these other points are of no avail to disturb my view of the 37th section; and accordingly the plaintiffs' case fails, and the action must be dismissed with costs.

Solicitors: *Gedge, Kirby & Millett, for Horwood & James, Aylesbury; Peake, Bird, Collins & Peake.*

G. I. F. C.

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Feb. 10; *April* 5.

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[1897 N. 964.]

Vendor and Purchaser—Memorandum of Agreement—"Subject to Approval of Form of Agreement"—Condition Precedent—Specific Performance—Mistake—Rescission—Statute of Frauds (29 *Car.* 2, *c.* 3)*—Form of Order—Interest—"Wilful Default."*

By "heads of agreement" between a vendor and purchaser it was agreed that the purchaser should purchase "36 acres of land," the boundaries of which were thereby accurately defined on three sides but not on the fourth, for 3600*l.*, "subject to approval of conditions and form of agreement by purchaser's solicitor." The vendor afterwards discovered that the land which he supposed formed the subject-matter of the contract measured out at 42 acres, and required the purchaser to take the whole 42 acres at 4200*l.*, being 100*l.* per acre. The purchaser, however, insisted that the contract should stand for the sale of 36 acres only, and brought an action for specific performance on that footing:—

Held, that the purchaser was entitled to specific performance on three grounds: (1.) that the fourth boundary could be readily fixed so as to include 36 acres; (2.) that the "heads of agreement" constituted a complete contract, and that the clause, "subject to approval, &c.," was not a condition precedent to a complete contract; and (3.) that there was no such mistake as entitled the vendor to rescission.

FORM OF ORDER.

The contract contained a stipulation that if the purchase was not completed by the day named, the purchase-money should bear interest at 4 per cent. from that day until actual completion:—

Held, that the vendor's repudiation of the contract by resisting the purchaser's claim to specific performance did not constitute such "wilful default" as to disentitle him to interest.

BY certain "heads of agreement" dated April 10, 1897, made between the defendant John Andrews Percival (on behalf of himself and the defendants Henry William Gates and Herbert Percival) as vendor, and the plaintiff Frederic William North as purchaser, the following agreement was alleged to be made for the sale and purchase of certain freehold land in the parish of Farcet, in the county of Huntingdon:—

"Land purchased, 36 acres of land, bounded on south by the parish of Yaxley, west by Great Northern Railway, and on other sides by land of the vendors. A strip of land on the north side of the width of 30 feet with sufficient land on the north-west corner to leave access to the railway, estimated altogether at one acre, is reserved to the vendors, and the 36 acres to be measured leaving such strip and access.

"Purchase-money 3600*l*. Settlement July 6, 1897. Purchaser may take possession forthwith on arranging with tenant, and paying interest at 3*l*. per cent. from time of taking possession. If purchase not completed on July 6, purchase-money to bear interest at 4*l*. per cent. from that day until actual completion. Where no fence exists between the land sold and the land retained, the vendors to make and maintain fence for the southern half of the distance, and the purchaser for the northern half, subject to approval of conditions and form of agreement by purchaser's solicitor."

The boundaries of the 36 acres on three sides were admitted to be clear, and the only difficulty was as to the line to be drawn upon the eastern side, where there was no visible division between the part intended to be sold and the part intended to be retained by the vendors. It was afterwards discovered by the vendors that the land which they considered to form the subject-matter of the contract measured out at 42 acres and not 36, and that the whole amount of their land in that locality was 52 acres, of which they only intended to retain 10 acres.

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The vendors had not marked out a boundary line on the east, but they required the purchaser to take the 42 acres at the price of 4200*l*., on the footing of the sale being at 100*l*. per acre of all the land the vendors had to sell. This the purchaser declined to do, and brought this action for specific performance of the alleged agreement of April 10, 1897, as an agreement for the sale of 36 acres by admeasurement.

The defence alleged that there was no complete and binding contract for the purchase or sale of any land; that if there was it was only made subject to the approval of conditions and form of agreement by the purchaser's solicitor, and no such approval had been given; and that the Statute of Frauds had not been complied with. The defence then further alleged that there was no sufficiently defined land, and that it had not been measured or marked off; also that if, contrary to the defendants' contention, the document of April 10, 1897, constituted a binding contract, the price thereby fixed was intended by all parties to be a price ascertained at the average rate of 100*l*. per acre for the whole of the land intended to be the subject-matter of the contract, and that such contract was made under a mistake on the part of the defendants that the land intended to be the subject-matter thereof contained 36 acres only, whereas such land in fact contained 42 acres; and the defendants counter-claimed for rescission of the contract, if binding, on the ground of mistake.

The action now came on for trial.

Warrington, *Q.C.*, and *R. Rowlands*, for the plaintiff. It is clear, upon the heads of agreement, that the contract is for the sale of 36 acres only. Parol evidence is admissible to shew what were the 36 acres intended, and the element of uncertainty in the measurement of the land may be disregarded: *Plant* v. *Bourne* (1); *Wylson* v. *Dunn*. (2) There is no uncertainty where a thing can be made certain. It is for the defendants to mark out the boundary of the 36 acres on the east, and the fact that they have not done so cannot be relied upon by them as a defence. We ask for an order according to the terms of that in *Jenkins* v. *Green.* (1) As to the provision at the end of the heads of agreement, that was for the benefit of the purchaser, and can be waived by him.

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(1) [1897] 2 Ch. 281.

(2) (1887) 34 Ch. D. 569.

Renshaw, Q.C., and *Christopher James*, for the vendors. The plaintiff cannot now waive the stipulation about a formal contract at the end of these informal heads of agreement as being intended for his benefit alone, so as to constitute the rest of the document a final and binding contract. There was no binding contract at all, as the parties were not really ad idem: *Lloyd* v. *Nowell* (2); *Crossley* v. *Maycock.* (3) There was a mistake—if not a common mistake, then it was an unilateral mistake—for which the remedy is rescission: *Paget* v. *Marshall* (4); *Wilding* v. *Sanderson.* (5)

KEKEWICH J. Omitting for the moment the last clause in the heads of agreement of April 10, 1897, and reading the document as the production of two business men embodying a bargain come to between them, it seems to me to present no great difficulty. [His Lordship then, after considering the document, came to the conclusion that it was a contract for the sale of 36 acres, and that, as the boundaries on three sides were accurately defined, a competent surveyor would have no difficulty in fixing a boundary line on the fourth side so as to include the exact amount of 36 acres. His Lordship then continued:—] Then comes a much more serious question. Mr. Percival, the vendor, says, "Not only am I entitled to resist the specific performance of this agreement, but I am entitled to rescission on the ground of mistake." Some authorities were referred to upon that point, but I am not going into them, because a mistake must first be established. Now what was the mistake? There was a mistake in one sense: there is no doubt about that. The parties did not know that the land contained 52 acres. Mr. North says he was buying, not 52 acres less 10, but 36 acres. The vendors thought the same: they knew they had to sell 36, and they thought they had only 46 acres in the whole, of which the 10 acres would be retained. It now turns out that Mr. North will get just what he intended to get—namely, 36 acres—and that the vendors will retain more than they intended to retain. They now complain bitterly that instead of having 10 acres left they will have 16. It is a strange sort of complaint, and the mistake does not appear to me to be one which goes to the root of the contract. It may be to the disadvantage of the purchaser, but does not really touch the substance of the contract. The claim, therefore, for rescission seems to me to fall to the ground.

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(1) (1858) 27 Beav. 437.

(2) [1895] 2 Ch. 744.

(3) (1874) L. R. 18 Eq. 180.

(4) (1884) 28 Ch. D. 255.

(5) [1897] 2 Ch. 534.

There is one point more. At the end of the heads of agreement these words occur, "subject to approval of conditions and form of agreement by purchaser's solicitor." That means something, no doubt; but the question is, What does it really mean? The point has come up for decision again and again, and I can only repeat the passage in Lord Blackburn's speech in the case of *Rossiter* v. *Miller* (1), which I myself cited in the case of *Lloyd* v. *Nowell* (2): "I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up." In *Lloyd* v. *Nowell* (2) I thought—and on looking at the case again I have no doubt I was right in thinking—that a formal agreement was an essential part of the contract, and that this was wanting. It is a point which is not free from difficulty; but I think that in the present case this was not a condition precedent to a complete contract. The parties have agreed, as I hold, to what is to be sold, and the price to be paid, and to some few smaller matters, such as the fence to be erected, and so on; and then it probably occurs to them that this will not quite do and that a formal contract must be prepared, and the purchaser says that his solicitor must approve of such formal document. That is all. There has been no contract prepared, and the purchaser's solicitor has not approved, nor has he disapproved. It seems to me that was only meant as a convenient stipulation for making this matter move smoothly. I cannot

(1) (1878) 3 App. Cas. 1124, 1152.

(2) [1895] 2 Ch. 744.

myself see that it governs the whole contract so as to put an end to it, or at least to prevent it being complete until there is a formal document. I think, therefore, that there is a complete contract without any more formal document.

The operative part of the minutes of order as drawn up by the registrar was in the following form:—

"This Court doth declare that the agreement of the 10th day of April, 1897, in the pleadings mentioned, constituted a binding contract between the plaintiff and the defendants for the sale by the defendants to the plaintiff of 36 acres of the defendants' freehold land situate in the parish of Farcet, in the county of Huntingdon, lying to the east of the Great Northern Railway, at the price of 3600*l.*, and that the same ought to be specifically performed and carried into effect; and doth order and adjudge the same accordingly.

"And it is ordered that the defendants be at liberty to fix the exact eastern boundary of such land, having regard to the terms of the said agreement, but that they are not entitled to exercise that liberty so as to interfere with the beneficial enjoyment by the plaintiff of the 36 acres of land aforesaid.

"And the plaintiff by his counsel accepting the title to the said land, it is ordered that interest be computed at the rate of 4*l.* per centum per annum on the said sum of 3600*l.*, the purchase-money for the said land comprised in the said agreement, from the 6th July, 1897, when the same ought to have been paid according to the terms of the said agreement. And it is ordered that the following account be taken, namely—

"An account of the rents and profits of the said land received by the defendants or any of them, or by any other person or persons by their or any of their order, or for their or any of their use, since the 6th July, 1897.

"And it is ordered that it be referred to the taxing master to tax the plaintiff's costs of this action and counter-claim. And it is ordered that what shall be coming on the said account of rents and profits, and the costs when taxed, be deducted from the amount of the said purchase-money and interest when so computed as aforesaid. And it is ordered that, upon the plaintiff paying to the defendants the balance which shall be certified to be due to them in respect of such purchase-money and interest after such deduction as aforesaid, the defendants do execute a proper conveyance of the said lands comprised in the said agreement to the plaintiff or to whom he shall appoint, such conveyance to be settled by the judge in case the parties differ, and deliver to the plaintiff (upon oath if required) all deeds and writings in their custody or power relating thereto.

"And either of the parties are to be at liberty to apply as advised."

The plaintiff subsequently moved to vary the minutes by striking out the admission of title and the direction as to payment of interest on the purchase-money, and by inserting a direction for an inquiry as to title.

Warrington, Q.C., and *R. Rowlands*, for the plaintiff, the purchaser. In case of wilful default on the part of a vendor in carrying out his contract, the purchaser cannot be ordered to pay interest, even though the contract says that it shall be paid in any event. It is certainly not usual to make such an order where the non-completion has been caused by the repudiation of the contract by the vendor.

[Kekewich J. referred to *In re Woods and Lewis' Contract.* (1)]

De Visme v. *De Visme* (2) is conclusive that where the delay in the completion of a contract is due to the wilful default of the vendor, he cannot claim interest from the purchaser except from the time a good title has been shewn; and here that has not yet been done. The title to the property was not, as a matter of fact, admitted at the trial, and it is now asked that that part of the order may be struck out (as well as the direction for payment of interest), and an inquiry directed as to title.

Renshaw, Q.C., and *Christopher James*, for the vendors. We will consent to an inquiry as to title being substituted for the admission of title; but we submit that the direction for payment of interest should stand. The purchaser cannot ask for performance of the contract and then seek to vary it. The decree is right. There is no rule that, where a vendor, upon a doubtful document, submits on the construction that there is no such contract as the purchaser contends for, such a vendor is to be deprived of interest provided for by the contract when the contract has been upheld. That does not amount to wilful default.

Warrington, Q.C., in reply.

Kekewich J. It is agreed on both sides that the judgment in the action was the usual decree for specific performance. There is no "usual decree" in the sense insisted on—namely, of one form applicable to every action. The "usual decree" means that which, according to the practice and books on such subjects, is the decree for specific performance adapted to the

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(1) [1898] 1 Ch. 433.

(2) (1849) 1 Mac. & G. 336.

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particular circumstances of the case. Sometimes it is a vendor's action, sometimes a purchaser's action; sometimes the title is accepted, sometimes it is not. I think it is open to me now to consider whether the registrar was right in inserting into this decree a direction for payment of interest. That turns upon these words in the contract: "If purchase not completed on July 6, purchase-money to bear interest at 4*l.* per cent. from that day until actual completion." I follow what Romer J. says in the case which I referred to of *In re Woods and Lewis' Contract* (1), when, referring to the observations of Knight Bruce L.J. in *Williams* v. *Glenton* (2), he says: "No doubt he was there dealing with a case where the interest clause made interest payable if delay occurred 'from any cause whatever,' but it had been previously settled that the generality of those words did not allow a vendor to claim the interest where delay occurred by his 'wilful default.'"

If the vendors here have been guilty of wilful default, they cannot claim interest, notwithstanding the stipulation in the contract which gives interest after July 6 until actual completion. Have the vendors been guilty of wilful default? Many cases have been decided illustrating what "wilful default" means. And the case before Romer J. shews what "wilful default" does not mean. "Wilful default" is obstruction in the completion of the contract. All the cases come to this, that there must be obstruction in the matter of completion. But the repudiation of the contract altogether, and saying that the purchaser is not entitled to specific performance—is that "wilful default" within the authorities? It is certainly not of the same kind; but is it wilful default of a similar character? I think it is not, and that this case should be decided upon a different ground. The vendors having repudiated the contract, the question arose whether the contract should be completed or not. The purchaser insisted upon completion. Having obtained a decree, he now says that it should be performed with a modification in his favour. The argument is that there should be a modification, because, upon the true construction, he says that he is not bound to pay interest where the vendor has obstructed him. The answer is, that the vendor has not obstructed in the sense in which the authorities have used that word. I think that the registrar was perfectly right in settling the judgment according to the usual form, with a direction that interest should be paid until completion, and set off against rents and profits.

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(1) [1898] 1 Ch. 433, 436.

(2) (1866) L. R. 1 Ch. 200.

The vendors having consented to the withdrawal of the admission of title, that will be struck out, and the order will go as drawn, except that there will be in addition an inquiry as to title; and the purchaser must pay the costs of the motion.

[In accordance with his Lordship's decision, the words "and the plaintiff by his counsel accepting the title to the said land" were struck out of the minutes, and the following words substituted: "And it is ordered that the following inquiry be made, namely, an inquiry whether a good title can be made to the said freehold land. And in case a good title can be made thereto, it is ordered," &c.]

Solicitors: *Morley, Shirreff & Co.; Clarke, Rawlins & Co., for Percival & Son, Peterborough.*

G. I. F. C.

NEW IXION TYRE AND CYCLE COMPANY *v.* SPILSBURY.

KEKEWICH J.

1898

May 10.

[1897 N. 1440.]

Patent—Licence—Agreement—Assignment — Registration — Title—Priority—Notice—Equitable Rights—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57); ss. 23, 87.

By an agreement in writing A., the registered proprietor of a patent, agreed to assign it to B. Before that agreement had been registered as required by s. 23 of the Patents, Designs, and Trade Marks Act, 1883, A. granted a licence to use the patent to C., who forthwith registered his licence. Subsequently B. registered his agreement, and then took and registered an assignment of the patent. C. when he took his licence had express notice of B.'s agreement:—

Held, both on principle and under the proviso in s. 87 of the Act, that C., notwithstanding his legal title by prior registration, could not assert that title so as to defeat B.'s equitable right by notice, and that therefore the licence was void as against B.

By an agreement of June 24, 1896, John Forrest Walters, the registered proprietor of certain letters patent relating to pneumatic tyres, agreed to transfer them to the plaintiffs, the New Ixion Tyre and Cycle Company, Limited. The agreement was not entered on the register of patents until September 27, 1897, but from the date of the agreement the plaintiffs had possession of the letters patent. On October 20, 1897, Walters by deed assigned the letters patent to the plaintiffs, and the assignment was duly registered. On September 16, 1897, Walters, for valuable consideration, granted a licence to the first four defendants, Spilsbury, Watling, Malcolm, and Grave, to manufacture and sell tyres under the letters patent. Notification of the licence was entered in the register of patents on September 18, 1897, that is, before the registration of the agreement of June 24, 1896. On October 6, 1897, those four defendants transferred all their rights under the licence to the defendants, the Licensed Tyre Syndicate, Limited, under an agreement of September 30, 1897. At the time the licence was granted to them, the first four defendants had full notice of the

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agreement of June 24, 1896, and of the plaintiff's equitable title to the patent. As the defendant company were proposing to work the patent under the licence, the plaintiffs brought this action claiming a declaration that the licence, or alleged licence, was invalid and void as against them, and that they were entitled to the patent free from any right or interest of the defendants as licensees or otherwise, and to have the licence delivered up to be cancelled; an injunction, damages, and an account and delivery-up of all articles manufactured under the licence. The first four defendants insisted that the rights obtained by them under the licence were not subject to any rights or equities of the plaintiffs, and the defendant company claimed their right to work the patent in accordance with their title. The main question for decision was whether the plaintiffs had lost their equitable rights under their agreement of June 24, 1896, by reason of their having failed to register it until after the registration of the licence.

The action now came on for trial. It was admitted in evidence that the first four defendants had actual notice of the agreement of June 24, 1896, some time before they took the licence.

Renshaw, Q.C., and *Rowden*, for the plaintiffs. It is now admitted that the first four defendants had, at the time they took the licence, full notice of our agreement with Walters, and, that being so, the defendant company are themselves bound by that notice. We clearly had, therefore, equitable rights to the patent under our agreement, and those rights were preserved by the proviso at the end of s. 87 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), and the registration of the licence under s. 23 (1) cannot be regarded

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(1) Sect. 23 is (so far as material) as follows: "(1.) There shall be kept at the Patent Office a book called the Register of Patents, wherein shall be entered the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licenses under patents, and of amendments, extensions, and revocation, of patents, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed.

"(2.) The register of patents shall be primâ facie evidence of any matters by this Act directed or authorized to be inserted therein."

Sect. 87 is as follows: "Where a

as conferring an absolute title on the defendant company. There is no reported authority on the effect of that proviso, but there are three cases under the old patent law which shew that a person who has registered an assignment with notice of a previous unregistered assignment cannot, by his registration, defeat the equitable rights of the previous assignee: *Re Green's Patent* (1); *In re Morey's Patent* (2); *Hassall* v. *Wright*. (3)

A. Powell and *Austen-Cartmell*, for the defendants. This agreement was nothing more than an equitable assignment, and was not put on the register in time. Sect. 23, which includes equitable assignments, should be read with s. 87, and makes registration conclusive as to the title of the person registering. The Court cannot go outside the registration, which is in itself complete evidence of title.

KEKEWICH J. The plaintiffs are, in my opinion, entitled to judgment. In arriving at that conclusion one must first consider the meaning of the 87th section of the Patents, Designs, and Trade Marks Act, 1883, to see how it affects the title of the plaintiffs and the defendants respectively, what it requires, and what is allowed independently of the Act.

First, there is to be a register of title: that is provided for by s. 23; and that register, it is not unimportant to observe,

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person becomes entitled by assignment, transmission, or other operation of law to a patent, or to the copyright in a registered design, or to a registered trade-mark, the comptroller shall on request, and on proof of title to his satisfaction, cause the name of such person to be entered as proprietor of the patent, copyright in the design, or trade-mark, in the register of patents, designs, or trade-marks, as the case may be. The person for the time being entered in the register of patents, designs or trade-marks, as proprietor of a patent, copyright in a design or trade-mark as the case may be, shall, subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licenses as to, or otherwise deal with, the same and to give effectual receipts for any consideration for such assignment, license, or dealing. Provided that any equities in respect of such patent, design, or trade-mark may be enforced in like manner as in respect of any other personal property."

(1) (1857) 24 Beav. 145.

(2) (1858) 25 Beav. 581.

(3) (1870) L. R. 10 Eq. 509.

includes equitable interests as well as legal; and this s. 87 protects the interests of the man who is on the register, so as to prevent a man who is not on the register asserting a legal or equitable title against the man who is on the register. That is the general principle. Anyone who registers an instrument, whether an assignment or otherwise, under this section must register it subject to any rights appearing from such register to be vested in any other person; and therefore it seems perfectly plain, and beyond all dispute, to my mind, that when the plaintiffs here registered their agreement of June 24, 1896, after the defendants had registered their licence, they, the plaintiffs, took, so far as the registered title was concerned, subject to that licence; and it is in fact because their agreement, and the assignment which followed it, are subject to that licence that they come here to insist that as against them the licence is invalid. The object of the action is to get rid, on equitable grounds, of the legal right which the statute gives them.

That brings me to the second question, Is it competent to the plaintiffs to insist upon the equitable right which is the foundation of their claim? The equity they insist upon here is this, that at the time the defendants accepted that licence they had, as it happens, not merely constructive but express notice of the agreement with the plaintiffs, under which they, the plaintiffs, afterwards took their assignment; and that therefore the defendants cannot insist on their registered licence as against the agreement of which they had notice. That is the plaintiffs' point. Why should they not make it? As regards the registration of ships, it took repeated legislation to keep the title to them clear of equities; and I take it that the defendants here are bound to shew that there is, in language of which there can be no doubt, some statutory provision excluding such title as that alleged by the plaintiffs. There is this proviso at the end of the 87th section which is at any rate not in favour of the defendants: "Provided that any equities in respect of such patent, design, or trade-mark may be enforced in like manner as in respect of any other personal property."

If the subject-matter of the agreement or assignment were a leasehold, there can be no doubt that the defendants, having notice of the agreement, could not take a title from Mr. Walters so as to defeat the plaintiffs. That is a species of personal property assignable at law, just as letters patent are assignable at law; and it seems that what is applicable to the one is necessarily applicable to the other. It may be that the proviso requires some discussion, that the limits and extent of it may have to be considered; but for the present purpose I am content to say that, at any rate, even if the proviso is not in favour of the plaintiffs, it is not in favour of the defendants, and that I think the proper construction of the Act is, that such an equity as the plaintiffs allege is open to them as an argument with reference to their title as appearing on the register.

Having disposed of that, I come to the question whether that equity is established. As regards the first point, and as regards the second which I am now approaching, I think it better to put aside the authorities cited on behalf of the plaintiffs, and for this reason: those authorities deal with earlier statutes, that is, statutes anterior to the particular statute which I am now construing; and it is better to say, of course without in the slightest degree criticising those decisions, that they cannot affect me because they are not decisions upon the statute now before me. Therefore I deal with the whole question on general principles.

Now, there can be no question that, before they took their licence, the defendants had express notice of the actual agreement which Walters had entered into with the plaintiffs. About that, on the evidence, there can be no doubt whatever. The defendants, therefore, knew that Walters had entered into an agreement with the plaintiffs, and they, the defendants, were bound to know, if they were not told, what that agreement was. I think on the evidence I must take it that they knew a great deal more than that, and that they were affected expressly with notice, that is to say, with knowledge, when they made their bargain with Walters for the licence, of the agreement which he had entered into with the plaintiffs. If I am right in my construction of the Act, it is quite impossible

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that the defendants could take their licence as against the plaintiffs after that notice. They must have taken it subject to the agreement.

[His Lordship then considered the effect of the agreement itself, holding that it was one capable of being specifically performed, and was therefore binding upon the defendants, and concluded:—]

The result is that I must hold that this licence, although on the register, and although on the register prior to the registration of the agreement of June 24, 1896, does not interfere with the plaintiffs' rights, and that, as against them, it is not binding. There must, therefore, be a declaration that the licence is void as against the plaintiffs; there will also be an injunction, and the defendants must pay the costs of the action.

Solicitors: *Lewis & Lewis; Foster Grave & Co.; Foss & Ledsam.*

G. I. F. C.

KEKEWICH J. 1898 *June* 10.

In re DAVIES.
ELLIS *v.* ROBERTS.

[1897 D. 929.]

Trustee—Administration Action—Accounts—Carrying back Account—Statutes of Limitation—Order, Form of—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.

Form of order for account by trustees entitled to the protection given by s. 8 of the Trustee Act, 1888, against liability to render accounts extending beyond six years from the commencement of the action.

This was an action, commenced by originating summons dated May 15, 1897, by the executrix of the will of Elizabeth Davies, spinster, recently deceased, the tenant for life of a moiety of the real estate and of the residuary personal estate devised and bequeathed by the will of her father Richard Davies, who died on May 10, 1873, against the trustees of the will of Richard Davies, asking (1.) to have the trusts of that will carried into execution by and under the direction of the Court;

(2.) to have such accounts and inquiries taken and made as might be necessary for ascertaining the balance in the hands of the defendants due to the plaintiff as executrix of Elizabeth Davies; and (3.) that the defendants might be ordered to pay the costs of the proceedings.

In her affidavit in support of the summons the plaintiff stated her belief that Elizabeth Davies had not received her full share of income of the trust estate, and that to the best of her information and belief no accounts were ever rendered by or on behalf of the defendants or either of them to Elizabeth Davies during her life, though since her death the defendants had, on application through her, the deponent's, solicitor, rendered certain accounts, but they were very incomplete. The plaintiff did not charge the defendants with any fraudulent breach of trust, but merely with the failure to furnish full and proper accounts.

In an affidavit in reply, the defendants insisted that they had rendered proper accounts; they further submitted that the plaintiff was bound by laches and acquiescence from requiring any further account; that they were protected by the Statute of Limitations from being called upon to furnish any account for more than six years prior to the commencement of the present proceedings, and that, under those circumstances, the proceedings were useless and oppressive and of no benefit to the estate, and could not make them, the defendants, liable for any more than the amounts shewn upon the accounts they had already furnished. They admitted that a balance was due from them on account of the estate, which balance was on deposit at their bankers on behalf of the trust, and this balance they offered to account for and pay over.

The summons now came on for hearing.

P. S. Stokes, for the plaintiff. It is said that under s. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), the plaintiff cannot have an account for more than six years from the date of the summons; but I submit that these trustees are not entitled to claim the benefit of this section. There are funds "still retained" by them within the exception in the section.

KEKEWICH J.

1898

DAVIES, *In re.* ELLIS *v.* ROBERTS.

[KEKEWICH J. Is not this question covered by my decision in *How* v. *Earl Winterton*? (1)]

That was a peculiar case, and the order was in a special form to meet that particular case.

[KEKEWICH J. (having sent for the registrar's book). My order, which was affirmed by the Court of Appeal, was very carefully framed, and I shall adopt the form of it in the present case. (2)]

Warrington, Q.C., and *Arnold Herbert*, for the defendants. We will submit to an account in that form.

KEKEWICH J. ordered that the trustees' account should be limited to six years prior to the date of the summons, in accordance with the form of account directed in *How* v. *Earl Winterton.* (1)

Solicitors: *Kennedy, Hughes & Ponsonby, for Pughe & Jones, Llanfyllin; Woosnam & Smith, for Minshalls, Parry-Jones & Pugh, Oswestry.*

(1) [1896] 2 Ch. 626.

(2) The account directed by the order in *How* v. *Earl Winterton* was in the following form:—

"And the defendant by his counsel admitting that on the 9th August, 1889"—six years before the issue of the writ—"there were moneys in his hands liable to the trust for accumulation by the will of the testatrix directed, This Court doth order that the following account be taken, that is to say, 1. An account of the moneys in the hands of the defendant on the 9th August, 1889, liable to the trusts for accumulation under the will of the testatrix, Mary Rabett, and of the rents and profits of the testatrix's estate subsequently received by him in respect of the said term of fourteen years; but in ascertaining the actual amount of the moneys in the hands of the defendant on the date aforesaid, any payments made before that date are to be allowed to the defendant." Further consideration adjourned. Costs reserved. Liberty to apply.

G. I. F. C.

NORTH METROPOLITAN TRAMWAYS COMPANY *v.* LONDON COUNTY COUNCIL.

ROMER J.
1898
April 29, 30;
May 14.

[1894 N. 1164.]

Taxation—Costs as between Solicitor and Client—Public Authorities Protection Act, 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1, *sub-s.* (*b*)—*Judgment for Defendant with Costs.*

Where a defendant, a public authority, in an action falling within the Public Authorities Protection Act, 1893, succeeds, so that substantially the defendant obtains judgment, the defendant is entitled under the Act to costs to be taxed as between solicitor and client, notwithstanding that the judgment as drawn up merely directs the plaintiff to pay the defendant's costs without directing how such costs are to be taxed. The omission of such a direction will not deprive the defendant of the benefit of the statute, the Court having no discretion in the matter when once it is clear that in substance judgment has been obtained by the defendant. It is not necessary that the judgment itself should shew on its face that the action was one falling within the Act.

Finlay v. *Seaton*, (1808) 1 Taunt. 210, *Forman* v. *Dawes*, (1843) 11 M. & W. 730, and *Lister* v. *Leather*, (1858) 4 K. & J. 425, discussed.

SUMMONS to review taxation.

This action was commenced to restrain the defendants from trespassing upon any part of the premises of the plaintiff company, and the plaintiffs claimed an injunction and damages.

The action came on for trial on May 17, 1895, when it was dismissed, and by the order of that date it was ordered that it should be referred to the taxing master to tax the costs of the defendants, except so far as such costs had been increased by a certain claim therein mentioned, which had been waived by the defendants at the trial, and the costs of the plaintiffs so far as they had been increased by such claim of the defendants; and it was ordered that such costs of the plaintiffs should be deducted from the costs of the defendants and the balance certified, and that the plaintiffs should pay such balance to the defendants.

On appeal, the judgment of May 17, 1895, was affirmed, and by the order dated December 13, 1895, it was ordered that the plaintiffs should pay to the defendants their costs occasioned by the appeal, such costs to be taxed by the taxing master.

On the costs of the defendants being carried in, the taxing master taxed the same as between solicitor and client. The plaintiffs carried in objections to the taxation, the grounds of objection being that the judgment of May 17, 1895, did not provide for payment of the defendants' costs as between solicitor and client, and that the costs should be taxed pursuant to the judgment only, and therefore as between party and party.

The taxing master, in his answers to the objections, stated that, in his opinion, the case being one which fell within s. 1, sub-s. (*b*), of the Public Authorities Protection Act, 1893, it would have been surplusage, and therefore improper, to direct in the judgment itself that the taxation should be as between solicitor and client, the words of the Act being positive.

A. H. Carrington, and *Frank Richardson*, for the plaintiffs, in support of the summons. The attention of the Court should at the trial have been drawn to the Public Authorities Protection Act, and it should then, if the Court was satisfied that the action fell within the Act, have been asked that the costs should be taxed as between solicitor and client as provided for by the Act. As this was not asked for, the ordinary rule prevails that, the action being dismissed with costs, the costs are to be taxed as between party and party: *Lister* v. *Leather* (1); *Hill* v. *Evans*. (2) The taxing master had no jurisdiction to decide that the action was one which fell within s. 1, sub-s. (*b*), of the Public Authorities Protection Act, and then to tax the costs on that footing. In *Harrop* v. *Ossett Corporation* (3) there was a question whether the case fell within the Act, and the costs were specially asked for as between solicitor and client.

[Romer J. I am clearly of opinion that the action is one falling within the Act, and the only question is whether the order of May 17, 1895, should have contained a direction that the defendants' costs should be taxed as between solicitor and client.]

[They also referred to *Cotterell* v. *Stratton* (4) and *United Telephone Co.* v. *Patterson*. (5)]

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(1) 4 K. & J. 425.
(2) (1862) 4 D. F. & J. 288.
(3) [1898] 1 Ch. 525.
(4) (1872) L. R. 8 Ch. 295.
(5) (1888) 60 L. T. 315.

J. Tanner, for the defendants. I submit that the taxing master was right in taxing the costs in the way he has, having decided that the case was within the Act. The Act having provided expressly that whenever in such an action judgment is obtained by the defendant, "it shall carry costs to be taxed as between solicitor and client," it is wholly unnecessary to insert a direction to that effect in the order, and it is not the practice to do so: *Finlay* v. *Seaton* (1); *Reeve* v. *Gibson*. (2)

Carrington, in reply.

Cur. adv. vult.

May 14. ROMER J. In my opinion, the taxing master is right in this case. The action was one that came within the provisions of the Public Authorities Protection Act, 1893, and judgment was in substance, apart from a special provision as to certain costs, which I need not further refer to, obtained by the defendant council with costs. So that under the Act the council became entitled to have its costs taxed as between solicitor and client. I do not think the Act was intended to take away the discretion of the Court in an unsuccessful action of the kind described in the Act to deprive the public authority in a proper case of its costs. In other words, the Court would not, in my opinion, in such unsuccessful action be obliged to let a judgment be "obtained by the defendant" within the meaning of that phrase as used in the Act where, in the judicial discretion of the Court, the case appeared one in which the defendant authority ought not to recover any costs against the plaintiff. But where in substance (and such a case ought to be dealt with as a question of substance and not of form) the defendant authority in an action falling within the Act succeeds, so that substantially the defendant obtains judgment, then the Court is bound by the Act to give the defendant solicitor and client costs.

Now in the case before me the defendant substantially obtained judgment, and I never intended to deprive it of its right to solicitor and client costs. But, owing to the Act not being specially referred to at the time judgment was given by me, my judgment as drawn up merely directed the plaintiff company to pay the defendants' costs without saying how they were to be taxed. I do not think the form of the judgment prevents the defendant from having its costs taxed as between solicitor and client according to the statute. Of course, the matter could easily be made quite clear by an application to the Court to have the form altered; but I do not think it is necessary to put the defendant to the expense of making such application. No doubt primâ facie an order to tax costs means taxation between party and party, and it would be better in cases of the kind now before me to insert expressly in the judgment that the costs are to be taxed as between solicitor and client. But the omission would not deprive the defendant entitled to the benefit of the statute of solicitor and client costs, the Court having no discretion in the matter when once it is clear that in substance judgment has been obtained by the defendant. Nor is it necessary that the judgment itself should shew on its face that the action was one falling within the Act. See *Finlay* v. *Seaton* (1), where a similar question arose under the Act 11 Geo. 2, c. 19; and see also *Forman* v. *Dawes* (2) with reference to the special Act there referred to. What Wood V.-C. said in *Lister* v. *Leather* (3) is not inconsistent with the view I take. There the Vice-Chancellor was only deciding what form it would be right his judgment should take in a patent action having regard to the provisions of s. 43 of the Patent Law Amendment Act, 1852; and it was especially advisable, whether necessary or not, that his judgment should declare that the costs he was giving were to be taxed as between solicitor and client, seeing that he had a judicial discretion whether he should give solicitor and client costs or not.

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(1) 1 Taunt. 210.

(2) [1891] 1 Q. B. 652.

I may add that on inquiry I find that in the Queen's Bench Division, in cases like that now before me, the masters do tax as between solicitor and client, though nothing is said in the judgment as to how the costs are to be taxed or as to the Act applying.

Solicitors: *Hugh C. Godfray*; *W. A. Blaxland*.

(1) 1 Taunt. 210.

(2) 11 M. & W. 730.

(3) 4 K. & J. 425.

G. M.

In re RUSSIAN SPRATTS PATENT, LIMITED.
JOHNSON *v.* RUSSIAN SPRATTS PATENT, LIMITED.

C. A.
1898
May 9, 10.

[1896 R. 595.]

Company—Debentures—Property—Charge on all Present and Future "Property" of the Company—Winding-up of Company.

A limited company having under its articles of association power to borrow money upon debentures charging its "property," both present and future, including its uncalled capital, issued debentures charging its undertaking "and all the property to which it now is, or shall at any time hereafter become entitled." The company afterwards went into liquidation; and it was held by the Court of Appeal that the expression "property" in the debentures did not include the capital of the company uncalled up at the commencement of the liquidation.

The decision of Stirling J. affirmed; and that of Chitty J. in *In re Streatham and General Estates Co.*, [1897] 1 Ch. 15, approved.

Appeal from Stirling J.

This company was, in the month of October, 1891, incorporated under the Companies Acts, 1862 to 1890, under articles of association which authorized the directors to borrow moneys for the purposes of the company, and to secure the repayment of such moneys "by the issue of debentures of the company charged upon the property and rights of the company (both present and future) including the uncalled capital."

In September, 1891, when only a portion of the capital had been called up, the company created and issued 193 10*l*. debentures, each of which charged "the undertaking of the said company, and all the property to which it now is or shall at any time hereafter become entitled, and all the estate right title and interest of the company in to and upon the said premises," with the payment of the principal and interest thereby secured.

The whole of these debentures were still outstanding and unpaid, and no interest had been paid on any of them.

After the issue of the debentures the company borrowed further sums of money, and in order to secure them gave charges, subject to the debentures, upon all its property, expressly including its uncalled capital.

Early in 1896 one of the debenture-holders brought this action on behalf of himself and all the other debenture-holders of the company in order to enforce their security, and by an order made in the action and dated April 14, 1896, a receiver was appointed.

On April 21, 1896, the shareholders passed a resolution for the voluntary winding-up of the company, and the receiver in the debenture-holder's action was appointed liquidator in the voluntary winding-up. An order was subsequently made in the action directing the usual accounts and inquiries, and pursuant thereto the master in March, 1897, made a certificate whereby he found that the property charged in favour of the debenture-holders included certain particulars, which he specified, and did not include the uncalled capital of the company.

A summons was then taken out on behalf of the debenture-holders to vary the certificate by including the uncalled capital in the particulars of the property charged in favour of the debenture-holders.

This summons was adjourned into court and came on for hearing before Stirling J., who was of opinion that he was bound by the decision of Chitty L.J. (then Chitty J.) in *In re Streatham and General Estates Co.* (1), and declined to vary the certificate.

The plaintiff now appealed.

Dunham, for the appellant. The learned judge held the case of *In re Streatham and General Estates Co.* (1) to be on all fours with the present, and felt bound by the decision therein. In that case, however, Chitty J. did not in his judgment refer to the case of *In re Pyle Works* (2), but founded his decision on *Stanley's Case* (3) and *In re Colonial Trusts Corporation* (4), which two cases appear to have proceeded upon the ground that capital called up by virtue of a statutory liability in a winding-up never becomes property of the company at all. But,

(1) [1897] 1 Ch. 15.

(2) (1890) 44 Ch. D. 534.

(3) (1864) 4 D. J. & S. 407.

(4) (1879) 15 Ch. D. 465.

C. A.
1898

Russian Spratts Patent, Limited, *In re.*
Johnson *v.* Russian Spratts Patent, Limited.

according to the decision of the Court of Appeal in *In re Pyle Works* (1), in which case power to borrow money upon the security of the uncalled capital of the company was given to the directors by the articles of association, the calls in a winding-up are part of the assets or capital of the company, and since that case it must be taken that uncalled capital is part of the property of the company; and, if that is so, why should not the word "property" include the uncalled capital?

[Lindley M.R. referred to *Howard* v. *Patent Ivory Manufacturing Co.* (2) and *In re Phœnix Bessemer Steel Co.* (3); and *Hamilton* referred to *In re Sankey Brook Coal Co., No.* 2 (4), and *Bank of South Australia* v. *Abrahams.* (5)]

Those cases followed the reasoning in *Stanley's Case* (6), and proceeded upon grounds that have been displaced by *In re Pyle Works* (1), which, moreover, has been approved and followed in *Newton* v. *Anglo-Australian Investment, Finance and Land Co.* (7) In *Page* v. *International Agency and Industrial Trust* (8) the word "assets" was held to include uncalled capital; and in *Webb* v. *Whiffin* (9) it was held that the word "assets" in s. 38 of the Companies Act, 1862, has the same meaning as the word "property" in s. 133, and that both alike mean all the recoverable unpaid capital as well as the other "property" of the company. All the cases which spring from the decision in *Stanley's Case* (6) proceed upon the principle that to treat the uncalled capital as property of the company would be an interference with the discretion of the directors as to calling it up, and none of them decide that the word "property" does not include uncalled capital. What is charged in this case is "the undertaking of the said company, and all the property to which it now is or shall at any time hereafter become entitled, and all the estate right title and interest of the company in to and upon the said premises."

The case of *In re Pyle Works* (1) has decided that the capital recovered in the winding-up is part of the capital (i.e., property) of the company; and I contend the capital cannot be split up and separated into distinct parts consisting of that called up while the company was a going concern, and that called up during the liquidation. [*Bower* v. *Foreign and Colonial Gas Co.* (1) was also referred to.]

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(1) 44 Ch. D. 534.
(2) (1888) 38 Ch. D. 156.
(3) (1875) 44 L. J. (Ch.) 683.
(4) (1870) L. R. 10 Eq. 381.
(5) (1875) L. R. 6 P. C. 265.
(6) 4 D. J. & S. 407.
(7) [1895] A. C. 244.
(8) W. N. (1893) 32.
(9) (1872) L. R. 5 H. L. 711.

W. F. Hamilton, for the respondents, the second mortgagees, and

Lavington, for the respondent, the liquidator, were not called upon.

May 10. LINDLEY M.R. I do not think we need trouble you, Mr. Hamilton. We have been considering this matter, and we have all come to the conclusion that although, in a sense, uncalled capital may be called property, yet it is property of a very peculiar description. After all, it is not a debt. It is a right to make a call and create a debt; and it is rather stretching the meaning of the word "property" to make it include such a right as that. When we look at the decisions we see that for years past, and in all the text-books to which professional men have recourse, it has been considered that in this class of document, namely, debentures of limited companies, the word "property" will not include uncalled capital. We are not prepared to depart from that line of decision.

Indeed, in this case I think we should be doing an injustice if we did, because the first debenture-holders here, if they took any advice at all, were probably told that the word "property" would not include uncalled capital; whereas the second debenture-holders, if they took advice, were probably told that they had got a charge on the uncalled capital safely enough, because it was expressly included in their charge; and we should be lending ourselves to something unfair if we interpreted the word "property" in the first debentures as including uncalled capital.

RIGBY L.J. Any other decision would, in my opinion, do great injustice not only in this, but in many other cases; and

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(1) W. N. (1877) 222.

I do not think we should depart from what has been held to be the meaning of the word "property" in these documents for years past.

COLLINS L.J. I am of the same opinion.

Solicitors: *Snell, Sons, & Greenip*; *Wilson, Bristows & Carpmael.*

W. W. K.

In re OLYMPIA, LIMITED.

[00,131, 00,136, 00,138 1895.]

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May 12, 13, 26.

Company—Promoters—Secret Profit by Promoters—Duty of Disclosure.

A limited company was being wound up, part of whose property consisted of land and buildings known as "Olympia," used for exhibitions, which were subject to debentures for 100,000*l.* and a mortgage for 10,000*l.*, the incumbrances exceeding the value of the property. On January 19, 1893, a syndicate was formed to buy Olympia with a view to a resale to a company or to some other purchaser. The syndicate agreement provided for the formation by the subscribers of a fund for that purpose to be vested in trustees, this fund to be applied in paying—(1.) the purchase-money; (2.) the expenses of forming the company. If the company was formed, four persons there named consented to become directors. The above four were nominated trustees, with power to do whatever was necessary to buy and resell Olympia and to promote and register the company, and power to purchase as an interim investment any debentures of the old company. It was provided that the sale to the proposed company or any other purchaser should be subject to and with the benefit of two agreements of even date, one of which was for a supply of refreshments to the proposed company by a firm in which two of the above four were interested, and the other was that a certain firm should be advertising agents of the new company. Each of those two agreements expressed that it was made by the syndicate for themselves, and so far as they could on behalf of the proposed company or other purchaser. The syndicate in January and the early part of February bought up the mortgage and some of the debentures for sums much below the amount they realized, and thus made a profit of 20,000*l.* On February 9 the syndicate bought Olympia for 140,000*l.* On March 20, 1893, an agreement was made between the syndicate trustees, as vendors, and Close, as trustee for the intended company, by which the vendors agreed to sell Olympia to the proposed company for 180,000*l.*; and it was declared by clause 7 that the validity of the agreement should not be impeached on the ground that the vendors as promoters or otherwise stood in a fiduciary relation to the company, nor should the vendors be required to account for any profit made, or to be made, by them by the purchase of any debentures or other charges on the property. On the same day the new company was registered, its objects as stated in the memorandum being (inter alia) to purchase Olympia and to carry into effect the last-mentioned agreement. The articles ratified the agreement, and directed the directors to carry it into effect, as also the two refreshment and advertising contracts. The four persons who were trustees of the syndicate were appointed by the articles the first directors. The prospectus referred to the existence of the contract with the vendors and stated the amount of the purchase-money but not the special terms. It also stated that any profits "made by the syndicate from interim investments were excluded from the sale to the company." The directors adopted the contract with Close and the agreements as to refreshments and advertising, and the syndicate received the 40,000*l.* disclosed profit on the sale of the property, and also the 20,000*l.* profit on the debentures and mortgage. Of this 20,000*l.* the four last-mentioned persons received as their share 6341*l.* The company being in course of winding-up, the official liquidator took out a summons under the Companies (Winding-up) Act, 1890, s. 10, against one of the four to compel him to replace the 6341*l.* as a secret profit for which the four were jointly and severally liable:—

Held, by Wright J., that the four stood in no fiduciary relation to the company at the time at which they purchased the debentures and mortgage, and that they were not accountable for the profits made on them.

Held, on appeal, that the syndicate trustees, having by the syndicate agreement of January 19 provided for the formation of a company, owed to it when formed the duty not to make a profit out of it without informing it of the fact, and giving it the opportunity of declining to allow such profit to be made at its expense. That here there was no sufficient disclosure as to the profits on the debentures, a reference to documents by the inspection of which it might be ascertained that profits had been made being insufficient; that clause 7 of the agreement with Close was not binding on the company, as the directors who adopted that agreement were not an independent body, but four persons who were to share in the profit complained of; and that the fact that the company, which had been kept in the dark as to the matter complained of, could not now rescind, was not a bar to relief: *Held*, therefore, that the four were jointly and severally liable to replace the 6341*l.*

THIS was an appeal by the official receiver and liquidator from an order of Wright J. dismissing a summons taken out by him against Gluckstein, a promoter and director of the company, under s. 10 of the Companies (Winding-up) Act, 1890.

In 1893 the National Agricultural Hall Company, Limited, was in course of being wound up. Its property consisted (inter alia) of some land and buildings called "Olympia," with divers effects upon them which had been used for exhibitions. This property was on sale, and was subject to debentures for 100,000*l.* and a mortgage for 10,000*l.* A syndicate was formed for the purpose of purchasing the property with a view to a resale. The incumbrances were considered to exceed the value of the property.

On January 19, 1893, what was called the syndicate agreement was entered into. It was an agreement between Herman Hart (described as secretary to the Freehold Syndicate) of the one part and the subscribers of the other part. It recited that the syndicate proposed to purchase Olympia with a view to a resale to a company to be registered or to some other purchaser. The agreement shewed that the syndicate here referred to was to be composed of the subscribers to the agreement. The agreement then provided for the formation by the subscribers of a fund for the above purpose, which fund was to be placed in the names of trustees. This fund was to be applied in paying for the purchase, and, secondly, in payment of the expenses of forming the company. It was then agreed by clause 2 that the trustees should do their best to buy Olympia for the syndicate and resell the same at a profit. By clause 3 it was stated that if such company should be formed, four persons—namely, Lyons, John Hart, Hartley, and Gluckstein, members of the syndicate—had consented to become directors if duly elected. Clause 4 bound each subscriber to take shares in the company to the amount of his subscription, if the capital should not be otherwise fully subscribed or underwritten. Clause 6 nominated the four above-named persons trustees, with full powers of management, and to do whatever might be necessary to buy and resell Olympia, and to promote and register the company, and to purchase "as an interim investment" any first mortgage bonds of the National Agricultural Hall Company, Limited. Clause 7 provided that the sale to the proposed company or any other purchaser should be made subject to and with the benefit of two other provisional contracts of even date. One of these was for the supply of refreshments to the proposed company by J. Lyons & Co., Limited (in which Lyons and Gluckstein were stated to be directors and shareholders). The other contract was that J. and H. Hart should be the advertising agents of the new company. These contracts were between the contractors of the one part and H. Hart as secretary or agent for the syndicate of the other part, and they contained recitals shewing that the syndicate contemplated buying Olympia and selling it to a new company which they proposed to form for the purpose of taking Olympia from them or their trustees, and that if they did so the company should take subject to and with the benefit of that contract, and should enter into an agreement with the contractor adopting the same with or without modification. If the syndicate should sell to any other purchaser, such sale should also be subject to, but with the benefit of, the contract. The first clause of each of these documents expressed that the agreements contained in them were made by the syndicate for themselves and, so far as they lawfully could, on behalf of the proposed new company or other purchaser.

The syndicate agreement was signed by several persons for various sums, amounting altogether to 35,950*l.*, of which, however, only 7192*l.* 10*s.* was ever actually paid. Pursuant to this agreement the syndicate, by their trustees—Lyons, J. Hart, Hartley, and Gluckstein—bought up 32,000*l.* debentures (on which considerable interest was due) and also the 10,000*l.* mortgage, which were incumbrances on the property known as Olympia. They gave 27,220*l.* for the debentures, which afterwards realized 42,358*l.*, and they gave 500*l.* for the mortgage, which afterwards realized 6096*l.* The profit on this transaction amounted to 20,734*l.* These purchases were made in the course of January and the early part of February, 1893.

At about the same time the syndicate agreed to buy the property called Olympia for 140,000*l.*; and on February 8, 1893, a formal agreement for sale to the aforesaid trustees at that price was executed; 20,000*l.* was paid by the purchasers as a deposit, and May 8, 1893, was the day fixed for completion of the purchase. The property was bid for in the chambers of the judge who had ordered the sale; 140,000*l.* was the highest bid, and it was higher by 8000*l.* than that which last preceded it. This last bid secured the property. No previous bid had exceeded 1000*l.* over the last before it.

By March 20, 1893, all necessary arrangements had been made by the syndicate trustees for the registration of a new company to buy the property thus acquired for 180,000*l.*—that is, 40,000*l.* more than the sum for which the trustees had acquired it. There was no concealment about this, nor did any one complain of it except so far as it enabled the syndicate to make a secret profit out of the debenture transaction. In order to carry out the arrangements for forming the company, an agreement dated March 20, 1893, was executed between the syndicate trustees (called the vendors) of the one part and one Close, a trustee for the intended company, of the other part.

This agreement recited the agreement of February 8, 1893, by which the vendors had agreed to buy the property for 140,000*l.*; then it recited that a company was about to be formed for the purchase of such property, and that the memorandum and articles of such company had been prepared with the privity of the vendors, and that the capital of the company should be 155,000*l.*, divided into 31,000 shares of 5*l.* each, and that by the articles of association it was provided that the directors should adopt and carry out the now stating agreement. Then it was agreed—(1.) that the company should buy the property known as Olympia, subject to, and with the benefit of, the two agreements of January 19, 1893, with J. Lyons & Co. for refreshments and with Hart for advertising; (2.) that the price should be 180,000*l.*—that is, 20,000*l.* to the vendors in repayment of their deposit, 120,000*l.* into court in discharge of the unpaid balance of 140,000*l.*, and the rest to the vendors; (7.) that the vendors should pay all the expenses of forming and bringing out the company and issuing its capital, and of completing the purchase and of the mortgage to secure debentures, and then came these words: "The validity of this agreement shall not be impeached on the ground that the vendors parties hereto as promoters or otherwise stand in a fiduciary relation to the company, nor shall the vendors parties hereto be required to account for any profit made or to be made by them by the purchase of any debentures of the National Agricultural Hall Company, Limited, or of any other charges upon any of the property of the last-mentioned company which are to be satisfied wholly or in

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part out of the fund paid or to be paid into court in the said action."

On this same March 20 the new company was registered by the name of Olympia, Limited. Its objects were stated by the memorandum of association to be (inter alia)—(1.) to purchase the property known as Olympia; (2.) to adopt and carry into effect, with such (if any) modifications as might be agreed, the last-mentioned agreement with Close. The capital was to be 155,000*l.*, divided into 31,000 5*l.* shares. Seven subscribers signed the memorandum of association for one share each.

The articles of association provided (4.) that the last-mentioned agreement should be ratified and binding, and the directors were directed to carry it into effect with such modifications, if any, as might be agreed on. The directors were also required to adopt and give effect to the refreshment and advertising contracts with J. Lyons & Co. and Hart, already referred to, with or without modification as the directors might think fit. By art. 73 the first directors were named. They were Lyons, Gluckstein, J. Hart, and Hartley—i.e., the four trustees of the syndicate, and the vendors to the company. Art. 40 conferred on the directors power to borrow on debentures.

Shortly after the registration of the company a prospectus was issued. It referred to the company as incorporated. The capital was stated to be 155,000*l.* in 31,000 5*l.* shares, and first mortgage 5 per cent. debentures 70,000*l.*, total 225,000*l.*, to be applied as follows. Purchase price 180,000*l.*, working capital 45,000*l.* The directors were stated to be Lyons, Hart, Hartley, and Gluckstein. The prospectus contained the following statement: "The promoters of this company, hereinafter called the vendors, who constitute the entire board of the company which lately produced 'Venice in London,' recently entered into a contract on behalf of a syndicate, of which they themselves are members, for the purchase of the entire Olympia property. The vendors effected this purchase on February 8, 1893, at competition before the chief clerk of Mr. Justice North, in the Chancery Division of the High Court of Justice, for 140,000*l.*, payable in cash, and they will, acting on behalf of such syndicate, be the vendors of that property to this company. Any other profits made by the syndicate from interim investments are excluded from the sale to the company. A printed form of the memorandum of agreement, which was signed by each member of that syndicate, may be inspected by intending applicants for shares or debentures at the offices of the solicitors of the company."

The prospectus also stated that the property had been recently valued at 197,876*l.*, and that the vendors had agreed to sell the whole to the company for 180,000*l.*, payable as to 155,000*l.* in cash, and the balance in cash or shares of the company. The prospectus then stated that out of the profit to be made by the vendors on behalf of the syndicate the vendors had agreed to pay the promotion expenses and other moneys, and it also stated that the four following agreements had been entered into—namely, those of February 8 and March 20 for the purchase and resale of the property, and the agreements of January 19, 1893, relating to the refreshment and advertising business of the company, and that the same might be inspected at the offices of the solicitors of the company. The syndicate agreement of the same date was not here enumerated, but the prospectus stated that "applicants for shares will be deemed to have waived the insertion of the dates and names of the parties to the before-named syndicate agreement, and to have accepted the above statement as a sufficient compliance with the requirements of s. 38 of the Companies Act, 1867, or otherwise, and all allotments will be made on this basis."

Applications for 17,000 shares and 272 debentures were received, and these were issued. The contracts with Close, Lyons & Co., and Hart were adopted by the directors, with a variation to the effect that 40,000*l.*, part of the 180,000*l.*, might be paid in shares. The 180,000*l.* was paid as to 171,000*l.* in cash and as to 9000*l.* in shares. Out of this transaction 40,000*l.*, being the disclosed profit on the sale of the property bought by the company, and a further profit of 20,734*l.*, made by the syndicate by buying up the debentures, went into the pockets of the syndicate. Of this last sum Lyons, Hart, Hartley, and Gluckstein received 6341*l.*, and this sum the liquidator of the company sought to recover from Gluckstein by the summons under the 10th section of the Companies (Winding-up) Act, 1890.

The summons having been dismissed by Wright J. on the ground that Gluckstein, Lyons, Hart, and Hartley were not promoters of the company when they bought the debentures and mortgage, the official receiver and liquidator appealed.

A. T. Lawrence, Q.C., and *Kirby*, for the appellant. These four persons were the promoters and directors of the company, and occupied a fiduciary position towards it; so that directly it came into existence they were bound to state the whole truth to the shareholders, and to keep back nothing that it was material for them to know. This is well-settled law. It is not enough to make partial disclosures, or incomplete statements, and afterwards to say that there was sufficient to give to the shareholders notice, or to throw upon them the burden of making inquiries or investigations by which they could have found out everything for themselves. Mr. Gluckstein and the three other promoters of the company have concealed the fact that they made a profit of 20,734*l.* out of the buying-up of the debentures. It was their clear duty to have informed the company of this fact, and they did not discharge that duty. There is thus a secret profit which they are jointly and severally liable to make good to the company. The order of the Court below ought to be reversed, and the appellants are entitled to an order for payment by Gluckstein in the terms of the summons, with costs both here and below.

[They referred to *In re Cape Breton Co.* (1) and *Bentinck* v. *Fenn.* (2)]

Cozens-Hardy, Q.C., *Muir Mackenzie*, and *Cassel*, for the respondent. Mr. Gluckstein and these other three gentlemen were only made directors for the purpose of carrying out a particular contract, i.e., that of March 20, 1893, which is binding upon the company under ss. 11 and 16 of the Companies Act, 1862, and the 7th clause of which constitutes a complete defence to this application: *Salomon* v. *Salomon & Co.* (3)

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(1) (1884) 26 Ch. D. 221; (1885) 29 Ch. D. 795.

(2) (1887) 12 App. Cas. 652.

(3) [1897] A. C. 22, 54.

Moreover, the so-called "secret profit" arose out of a transaction with which the company had no concern; the interim investments were mentioned in the prospectus, and any profits therefrom were specifically excluded from the sale to the company. The company is not in a position to rescind, and to give relief where there cannot be rescission is opposed to *In re Cape Breton Co.* (1) The liquidator who represents the company is insisting on a right inconsistent with the contract of March 20, 1893. Then, as to the point of Gluckstein and the three others being promoters, we say that a man is not liable as a promoter because he buys with the view of selling to a company, nor is he made a promoter by selling to a company. The first document is the syndicate agreement; the execution of that did not make them promoters, *Gover's Case* (2); and the case of *Erlanger* v. *New Sombrero Phosphate Co.* (3) is consistent with that. *Ladywell Mining Co.* v. *Brookes* (4) supports the same view, and is an authority in our favour on the whole case. When did the four become promoters? Suppose that in February, 1893, the syndicate had stopped short and not bought, they would have had their profits out of the mortgage and debentures, and so supposing they had not been able to form a company and had sold to some one else. The company which was formed to carry out the contract of March 20, 1893, cannot complain of the terms of it, and it says plainly that the vendors are not to be accountable for profits made from the mortgage and the debentures. Shareholders are bound by everything in the memorandum and articles: *Peel's Case.* (5) The absence of any fiduciary relation of the syndicate to the company at the time when the mortgage and debentures were bought is fatal to the appellant's case: *Bentinck* v. *Fenn.* (6) Clause 7 of the agreement of March 20, 1893, made a full disclosure of all that the four persons knew as to profits on the debentures and mortgage.

A. T. Lawrence, Q.C., in reply. It is not the fact that

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(1) 29 Ch. D. 795; affirmed by the House of Lords, 12 App. Cas. 652.

(2) (1875) 1 Ch. D. 182.

(3) (1878) 3 App. Cas. 1218.

(4) (1887) 35 Ch. D. 400.

(5) (1867) L. R. 2 Ch. 674, 684.

(6) 12 App. Cas. 652, 658.

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clause 7 of the agreement of March 20, 1893, made a full disclosure, for the four knew at the time the exact amount of profit that was being made out of the debentures and the mortgage. The expression profit "made or to be made" is misleading, for it was all made at that time. The prospectus states that the purchase was made by competition; but the fact is suppressed that the successful bidders were debenture-holders whose interest it was to raise the price.

The respondent's argument that if there cannot be rescission there cannot be any relief at all is unsound. In *Tyrrell* v. *Bank of London* (1), where a solicitor was charged with a profit made by him out of a purchase without the knowledge of his clients, the purchasers, Sir Roundell Palmer insisted on there being no relief, inasmuch as there could not be rescission; but that argument was overruled. As to the sufficiency of the disclosure, it was held in *Imperial Mercantile Credit Association* v. *Coleman* (2) that a rule that a director should "declare" his interest in a contract proposed for acceptance by the association was not satisfied by a mere declaration that he had an interest; and in *Dunne* v. *English* (3) it was decided by Jessel M.R. that an agent for sale who takes an interest in a purchase negotiated by himself must inform his principal, not only that he has an interest, but what is the nature of that interest. Then as to the time when Gluckstein and the other three became promoters, they deny that they were promoters on February 8, 1893, but they do not say when they became such.

[*Cozens-Hardy, Q.C.* We say it was on March 20, 1893.]

The scheme which resulted in the formation of this company began on January 19, 1893. Why were they not promoters then? When anything necessary to the formation of a company is done, then, if a company results, the persons doing that act are promoters. In the subsidiary agreements of January 19, 1893, the syndicate state that they make the agreements so far as they can on behalf of themselves and the proposed company, which is almost conclusive evidence that they were promoting the company. They were promoters according to the remarks of the present Master of the Rolls in *Emma Silver Mining Co.* v. *Lewis.* (1) In *Lydney and Wigpool Iron Ore Co.* v. *Bird* (2), circumstances which occur here were held to make Bird liable to account for a secret profit. *Gover's Case* (3) only decided that an agreement to promote a company does not make the parties promoters; and that is reasonable, for such an agreement is not a step in forming a company. In *Ladywell Mining Co.* v. *Brookes* (4) Cotton L.J. says (5): "It is undoubted that at that time—the 1st of February, and even before that—Palin and his friends did contemplate forming a company, and did contemplate not themselves working this mine, but dealing with it in the way of selling it at an increased price to the company to be formed. But no part of that purchase-money was to be provided for out of the funds of the company, or to consist of shares in the company; and, in my opinion, it is not sufficient for the appellants to shew that it was contemplated that the company should be formed, or even that it was contemplated at the time when Palin bought this mine that he should sell to a company, and that he should not work it himself." But here the profit comes out of the money of the company. In *Bentinck* v. *Fenn* (6) the decision went on the ground that there was no sufficient proof of concealment or of loss to the company. In *Kimber* v. *Barber* (7) the Master of the Rolls had refused relief on the ground that the rescission of the contract was impossible; but this was reversed. *Hichens* v. *Congreve* (8) shews that the mere fact that in words the contract may be made different will not prevent relief if there has been a duty and a breach of that duty.

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(1) (1862) 10 H. L. C. 26.
(2) (1873) L. R. 6 H. L. 189.
(3) (1874) L. R. 18 Eq. 524.

Cozens-Hardy, Q.C., on the cases cited in reply.

Cur. adv. vult.

May 26. LINDLEY M.R. This is an appeal from the dismissal by Wright J. of a summons issued by the liquidator

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(1) (1879) 4 C. P. D. 396, 407.
(2) (1886) 33 Ch. D. 85.
(3) 1 Ch. D. 182.
(4) 35 Ch. D. 400.
(5) 35 Ch. D. 409.
(6) 12 App. Cas. 652.
(7) (1872) L. R. 8 Ch. 56.
(8) (1828) 4 Russ. 562.

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of a company called Olympia, Limited, against a person named Gluckstein, under s. 10 of the Companies (Winding-up) Act, 1890. The allegation is that Gluckstein and others, being promoters and directors of the company, made a secret profit of 20,000*l.* at the expense of the company. The defence is that the profit in question arose from a transaction with which the company had no concern, and was, moreover, fully disclosed to the company. The case is important, not only to Mr. Gluckstein and those associated with him, but to all persons engaged in forming companies and who take shares in newly formed companies. The most ingenious mechanism has been devised in ordered to bleed this company to the extent of 20,000*l.* without the knowledge of the shareholders, and the question is whether the mechanism will answer its purpose.

The facts are not in dispute, and were shortly as follows. In 1893 a company called the National Agricultural Hall Company, Limited, was being wound up. Its property consisted (inter alia) of some land and buildings known as Olympia, and fixtures, machinery, furniture, and effects in and upon the same. This property was used for exhibitions and purposes of amusement, and licences for the sale of beer, wine, and spirits on the premises were held by the company. This property was for sale. The property was subject to heavy encumbrances—namely, 100,000*l.* in debentures and 10,000*l.* on mortgage, and its value was not sufficient to pay off all these charges in full. To what extent these securities could be realized depended mainly, if not entirely, on what could be got by a sale of the above property. It is obvious that the more the property sold for, the better for those who held the securities. If the securities could be bought up cheap and the property could be sold for much more than the sum due on them, a substantial profit would be made. Further, if the same persons could buy the debentures cheap and could also buy for a sum more than sufficient to pay off the securities, and if they could resell the property at an advanced price, they would make a double profit—namely, first, by paying themselves as holders of the securities the amount due on them; and, secondly, by paying themselves as vendors the advanced price at which they resold

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the property. Moreover, if it could be arranged that they should not pay for the property until they got paid the advanced price at which they resold it, they would not be under the necessity of making cash advances themselves to any considerable extent. These observations will render what was done quite clear.

[His Lordship then stated the syndicate agreement and the subsequent facts of the case in almost the same words as above, and proceeded as follows:—]

The only member of the syndicate with whom we have to deal is Gluckstein. The other three are not before us. But if any of them are liable they are all liable jointly and severally to make good the sum in question. The question, therefore, is whether these persons are liable to account to the company for the profit they made out of the purchase of the debentures and mortgage, which were incumbrances on the property sold to the company. It is plain that they took an active part in forming the company and in framing or approving its memorandum and articles of association, and also its prospectus. They were parties to the agreement with Close. They in fact were the creators of the company, and were the persons who brought it into existence fettered by the agreements with Close, Lyons, and Hart, and with themselves as sole directors. The company was skilfully formed, so that it should not be able to escape from the performance of those contracts, and so that no director should have an interest in investigating the conduct of those who created the company, and who were to obtain benefits from the payment of the 180,000*l.* which the company had to pay. But more, all this was done pursuant to the syndicate agreement of January 19, 1893, which provided for the formation of a company of which these four persons should be directors. Everything was done in order to enable the syndicate to make the double profit there contemplated. The formation of some such company as Olympia, Limited, was essential to carry out this agreement, and it was then agreed to form one, if possible, and the persons who then agreed to form a company, and ultimately did form it in order to carry the agreement into effect, owed duties to that company when it came into existence. One of such duties was not to make a profit out of it without informing it of the fact and giving the company an opportunity of declining to allow such profit to be made at its expense. These duties are imposed by the plainest dictates of common honesty as well as by well-settled principles of company law. They have invariably been enforced by the courts of this country. The leading case on the subject is *Erlanger* v. *New Sombrero Phosphate Co.* (1), every judgment in which may be referred to as an authority for the above statement of the law.

The next question is, Have the syndicate trustees and promoters of this company performed this duty or have they not? No evasion of it, however ingenious and skilful, in making that which is not a performance look as if it was, will suffice; and the main question which has to be determined in this case is whether the documents to which I have referred contain a sufficient disclosure of that which it was the duty of the promoters to disclose to the company and to those who were invited to join it. In considering this question we must recollect that we are dealing with matters of daily business, and must have regard to the habits and practical necessities of ordinary business men. Refined equitable doctrines of constructive notice have little, if any, application to such matters as are now being dealt with. To inform a person of a fact is one thing; to give him the means of finding it out, if he will take trouble enough, is another thing. A promoter of a company, whose duty it is to disclose what profits he has made, does not perform that duty by making a statement not disclosing the facts, but containing something which, if followed up by further investigation, will enable the inquirer to ascertain that profits have been made and what they amounted to.

I pass now to consider (1.) the disclosure which was made; (2.) to whom it was made; and (3.) its sufficiency. The disclosure made is contained in clause 7 of Close's agreement. If this is enough this will protect the defendants; if it is not, nothing else will. The reference in the prospectus to profits made by "interim investments" and to the syndicate agreement may be disregarded as wholly insufficient. The expression "interim investments" hardly points to such a transaction as the purchase and realization of the debentures and mortgage. The utmost that can be said of this part of the prospectus is that it suggests inquiry. Close's agreement is the real document to be considered. The company was formed to carry this out, and the directors were required by the articles to adopt and carry out this agreement with such modifications, if any, as might be agreed upon. Close's agreement, moreover, is referred to in the prospectus. But clause 7, which shews that the promoters and directors were making a profit out of the securities, is not referred to, but is left to be discovered by the directors, who have to consider the contract, and by such other persons as may take the trouble to see the contract itself. Whilst the prospectus states clearly that the promoters were making a profit of 40,000*l.*, it says nothing about the further 20,000*l.* The contrast is most marked. It comes, therefore, to this, that the fact that the promoters were to make an additional profit was not stated to any one, but might be found out, and must become known to the directors if they attended to their business when Close's agreement came before them for adoption. It may be that this would have been enough if the directors had been an independent board, and if they had adopted the contract with full knowledge of all the facts. But it is not necessary to determine whether even then the disclosure would have been sufficient. Let us see to whom this clause 7 and the real facts were known. They were known to the four directors who were the creators of the company, and who were to share in the profits which were to be got from the purchase-money which the company was to pay. Clause 7 and the real facts were not known to any one else connected with the company except to such members of the syndicate as took shares in the company. What effect, then, has such a knowledge by such persons on the right of the company to claim the profit thus being made by its directors and promoters out of it? My answer is, None whatever, except to deprive the directors who shared in the profit of all possible defence to such claim. To say that the knowledge of such persons of their own

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(1) 3 App. Cas. 1218; (1877) 5 Ch. D. 73.

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conduct, which from first to last they were doing all they could to conceal, is to be treated as the knowledge of the company or of the shareholders, is to say that which is opposed not only to common sense, but also to well-settled principles of law.

Having arrived at the conclusion that knowledge of clause 7 of Close's agreement cannot be imputed to the company, it is difficult to see upon what principle that clause can be binding on the company as part of the contract of purchase. The contract with Close, including clause 7, is said to be binding on the company by reason of s. 11 and s. 16 of the Companies Act, 1862, which say that the memorandum and articles of association shall bind the company and the members as if each member had covenanted to observe the conditions and regulations therein contained. But a series of decisions beginning with *Eley* v. *Positive Government Security Life Assurance Co.* (1), and including but not ending with *Browne* v. *La Trinidad* (2), shew that, notwithstanding these sections, contracts entered into before the formation of a company cannot be enforced against it until the company after its formation has agreed to be bound by them. Then how did clause 7 of Close's agreement become binding on the company? It is said because the directors adopted it, as they had power to do by the articles. This might be a good answer if the directors had been an independent body; but considering who they were and their position, the adoption of Close's contract by them with this term in it would not render the contract binding on the company, and the company might have repudiated the contract as soon as the company discovered how it had been tricked. Having regard to the constitution of the company and to the concealment of the real facts, I regard clause 7 as absolutely nugatory; not only does it fail to give notice to the company of the facts really concealed from it, but it also fails to preclude the company from seeking redress by reason of such concealment.

There remains, however, the further difficulty, that the company has not repudiated the contract, and is not now in a

(1) (1875) 1 Ex. D. 20, 88.

(2) (1887) 37 Ch. D. 1.

position to restore the property to the vendors. It is said that in such a case as this rescission of the contract is the only remedy. This is, in my opinion, quite wrong. The same people who saddled the company with the property have prevented its restitution in the condition in which the company acquired it. The company as distinguished from its promoters and directors never was in a position to consider whether it would take or keep the property or return it to the vendors in the condition in which the company took it. The company no doubt got the property; but it got it nolens volens, and its inability to return it as it got it does not justify the conclusion that the company has elected to keep it, and can only keep it on the terms of complying with clause 7. Upon principle it appears to me clear that there is nothing to prevent the company from claiming the profit secretly got from it by those whose duty it was not to make such profit without informing the company of what they were doing.

A few words must, however, be said respecting the authorities relied on by the defendant. *Salomon* v. *Salomon & Co.* (1) is in no way opposed to this conclusion. That case turned on the fact that every member of the company knew everything of the circumstances upon which the liquidator afterwards relied in order to support the claim he made in the name of the company, but really on behalf of its creditors, who in the view taken by the House of Lords had not been defrauded. Neither is this case covered by *In re British Seamless Paper Box Co.* (2), for nothing was concealed from any one in that case. But what Sir George Jessel there said is very pertinent to the present case. He said (3): "I quite agree to this, that if promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors is approved of by the directors of the company, who are the promoters, just before the allotment or just after: in both cases it is intended to cheat the future shareholders; and of course it makes no difference whatever that the persons who, at the time the allotment was made, were

(1) [1897] A. C. 22.
(2) (1881) 17 Ch. D. 467.
(3) 17 Ch. D. 471.

in fact the promoters or their nominees, knew of the fraud. You can defraud future allottees as well as present allottees."

The syndicate agreement and the two other agreements of even date remove all difficulty which in their absence might have been created by *Gover's Case* (1) and by *Ladywell Mining Co.* v. *Brookes* (2), so far as that relates to the commencement of the character of promoter.

The right to recover the profit without rescinding the contract of purchase is said to be inconsistent with, and indeed directly opposed to, the decision of this Court in *In re Cape Breton Co.* (3), which was affirmed by the House of Lords, but on different grounds. (4) The *Cape Breton Co.'s Case* (3) was followed by this Court in *Ladywell Mining Co.* v. *Brookes* (2); but in *Lydney and Wigpool Iron Ore Co.* v. *Bird* (5) it was pointed out (6) that the decision in the *Cape Breton Co.'s Case* (3) turned on the special combination of facts which had there to be considered. The report of the *Cape Breton Co.'s Case* (7) shews that one great difficulty presented by it arose from the fact that the promoters had bought and paid for the property which they afterwards sold to a company. They did not, as here, pay for what they bought out of money got from the company to whom they resold it. Pearson J. and the Court of Appeal treated the vendors simply as persons who had sold their own property to a company afterwards promoted by them without disclosing the fact that the property was theirs. This is the true explanation of the principal difficulty felt by Pearson J. and by Cotton and Fry L.JJ. in the *Cape Breton Case* (3), whose judgments, however, were dissented from by Bowen L.J. No one decided in that case that as a general proposition the mere fact that a contract for purchase by a company cannot be rescinded precludes the company from obtaining from the vendor if he is a promoter, and still less if he is also a director, a secret profit made by him at its expense. So to hold would be contrary to well-settled law and to many decisions, some of which were referred to in *Lydney and Wigpool Iron Ore Co.* v. *Bird.* (1)

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(1) 1 Ch. D. 182.
(2) 35 Ch. D. 400.
(3) 29 Ch. D. 795.
(4) See 12 App. Cas. 652.
(5) 33 Ch. D. 85.
(6) Ibid. 94.
(7) 26 Ch. D. 221.

The conclusion, therefore, at which I have arrived is that the persons who promoted this company and were its sole directors did in fact obtain from it a profit for themselves without letting any persons except themselves and their associates know that they were doing so. No ingenuity is required to disclose the truth, but much is often required to disclose it and to form a company without frightening persons by the disclosure. But where there is a duty to disclose a fact no mechanism for concealing it, however ingenious, can avail, unless indeed it fails to answer its purpose by really disclosing what it is intended to hide. In my opinion, the order appealed from must be reversed and an order be made for the payment by Gluckstein of the sum mentioned in the summons (after deducting what, if anything, may have been recovered from the other defendants), and of interest at 3 per cent. and of the costs here and below.

RIGBY L.J. I should be content to rest my judgment on the reasons given by the Master of the Rolls, in which I concur; but as we are overruling the judgment of the learned judge in the Court below, I think it right to put forward in my own language the reasons which appear to me to be sufficient to justify the order which we propose to make.

The Master of the Rolls has stated so exhaustively the material facts of the case that it is unnecessary for me to repeat them. They appear to me to establish that from January 19, 1893, each of the members of the syndicate who became directors of the company acted as a promoter of it. The fact that an option was in terms reserved to sell the property to another purchaser in no way affects the conclusion. If no company had in fact been formed, no one could be fixed as a promoter. The fact, however, is that the company was formed in accordance with what was evidently the leading intention. All the arrangements prospectively entered into on January 19, including the purchase with a view to a sale to the company,

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(1) 33 Ch. D. 94.

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the sale itself, the fastening upon the company of the collateral agreements as to refreshments and advertisements, and the appointment as directors of the persons selected to fill the office, were carried out in strict accordance with the agreements made. This is not a case of a mere intention unaccompanied by an overt act, but of plans deliberately agreed upon and deliberately carried out to their final result, determining in most essential matters the form and substance of the constitution and the obligations of the company. The persons who entered into the agreements of January 19 did so with the express purpose of promoting the company.

The purchase of the debentures and of the mortgage for 10,000*l.*, and of the property of the company in liquidation, were all steps towards the contemplated end of procuring profit by the promoters out of the capital of the company being promoted, at the expense in the main, not of the members of the syndicate or of those associated with them, but of members of the public who could be induced on the faith of the representations made to them to subscribe for shares in the new company. Upon the floating of the new company and the obtaining of the necessary capital depended not only the 40,000*l.* profit which was plainly and openly avowed, but also the profit coming out of the 140,000*l.* payable for the property of the old company—that is to say, the profit of the promoters arising from their speculation in debentures and in the mortgage of the old company.

I have read not only the judgment of the Master of the Rolls, but that about to be pronounced by Collins L.J., and for the reasons indicated by them I do not see how it can be doubtful that, independently of art. 7 of the agreement of March 20, 1893, the scheme of the promoters of making a profit at the expense of the new company, by charging more for the debentures and mortgage than the promoters themselves paid, must have been treated, as a device to obtain and divide a secret profit, and a fraudulent breach of duty. The reference in the prospectus to profits derived from interim investments, so far from being a disclosure of the speculation in the debentures and the mortgage of the old company, seems to me to be calculated to divert attention from the real facts. No one could suppose that under the words "interim investments" such a speculation could be comprised. The phrase "interim investments" is indeed applied in the contract to the speculations; but that, again, is only in my judgment used for the purpose of giving a colour to the meaning attempted to be put upon the words in the prospectus.

The only circumstance in this case which seems to me to present any novelty is that the promoters by art. 7 seek to make the retention of the profit now sought to be recovered part of the bargain between them and the company. If this had been done in an open manner, totally different considerations might have arisen; but in my judgment careful and effectual precautions were taken to prevent the existence of that clause from becoming generally known. It was for this object no doubt, among others, that the promoters, going beyond anything that I remember to have been before attempted, composed the entire board of directors of members of their own body, thus effectually preventing the possibility of any interference with their plans by an independent director. They thus secured the control of the new company's seal; but in my judgment such an attempt to create absolution for themselves from the consequences of what would otherwise be a fraudulent breach of duty must altogether fail. There never was the slightest intention on the part of any one of the directors to do his duty to the company with reference to the profit impeached: they were only trying secretly, as regards the main body of the subscribers for shares, to weave a net of legal technicalities which might hamper the company in its endeavours to get rid of the fraud attempted to be practised. In my judgment the proper answer to this attempt is to strike out of the agreement art. 7 as a step in the fraud contemplated.

In the result Gluckstein is liable, not only jointly with the other respondents, but severally liable to return the whole sum with which the summons seeks to fix him.

COLLINS L.J. It is not necessary to restate the facts, which have been fully set out in the judgment delivered by the Master of the Rolls.

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If the sum claimed by the summons was received by the defendant and his co-directors as a profit upon a transaction in the conduct of which they stood in a fiduciary relation to the company, it is clear law that they can be compelled to refund it unless they can shew that they have retained it with the knowledge and consent of the company. If, therefore, they in fact stood in such a relation to the company in the acquisition of Olympia, as well as in the adoption of the contract of purchase by the company from them, they are bound to account for the sum in question unless they can shew that they disclosed the facts to the company. It is said that they have disclosed them, inasmuch as at the time of its formation the company was composed exclusively of the seven subscribers to the memorandum, all of whom, being mere nominees of the syndicate, may be taken to have been fully cognizant of all the facts, and that furthermore the contract which was adopted by the company, acting by the defendant and his three co-directors, contained a clause relieving them from accounting "for any profit made or to be made by them by the purchase of any debentures of the Agricultural Hall Company, Limited, or of any other charge upon any of the property of the last-mentioned company, which are to be satisfied wholly or in part out of the fund paid or to be paid into court in the said actions," i.e., the purchase-money of Olympia. It is to be observed that, to people who did not know the facts, this is not a disclosure of the fact that any such profit had been made, much less of the amount of it. But can the defendants, if they are once placed in the position of being debarred from retaining this profit unless they have fully disclosed it, set up disclosure to themselves and their nominees as satisfying this obligation to disclose to the company, and so entitling them to retain it against the liquidator? Or if, having come under the obligation to disclose, they have not done so, can they nevertheless rely on the clause relieving them from accountability?

It would certainly be an extraordinary result if, by constituting seven of their own nominees signatories of the memorandum and themselves the directors of the company, they could relieve themselves of an obligation which would unquestionably have lain upon them had these bodies been composed of disinterested persons. But I think it is quite clear both on principle and upon authority that they cannot. The fallacy in the contention that they can, lies in the assumption that the sole duty of the promoter or director is towards the seven persons who for the time being constitute the only shareholders in the company. The corporate entity towards which the duty exists is a thing apart from the seven individuals who for the time being are the only corporators, and the question whether disclosure to them will suffice or not, will depend on whether the constitution of the company is really such that they can be in fact contemplated as exhausting all the persons whom the company is intended to embrace. There may be a company such as is sometimes called a private company, or sometimes a one-man company, where by its very constitution no one is intended to have, and cannot be contemplated as being about to acquire, an interest in the company except the signatories themselves. In such case the fiduciary obligation might not extend beyond such persons: see *Salomon's Case.* (1) But where, as here, the very pith and marrow of the whole adventure is that cash to the extent of 180,000*l.* shall be subscribed by the public for the benefit of the promoters and directors, the duty extends to all the persons who are to be contemplated as about to become shareholders. There is abundant authority for these propositions. In *Erlanger's Case* (2), where, as here, the signatories and acting directors were mere creatures of the promoters, Jessel M.R. says (3): "These gentlemen who were nominated as directors had a duty to perform, not to the then nominal shareholders, who were nobodies—there were really none, although there were persons who had agreed to take shares—but to the future shareholders who were to form the real company." And, on the ground that such disclosure had not been made, he held that the contract confirmed by such directors could be repudiated by the company. "I think," he says lower down, "the promoters (being, as I said before, in a fiduciary position), not

(1) [1897] A. C. 22.

(2) 5 Ch. D. 73.

(3) 5 Ch. D. 113.

only having avoided making a complete disclosure, not only having concealed material facts, but having also misrepresented material facts, there was no binding contract on the company." Now, the misrepresentation and concealment to which he is referring is obviously not in relation to the seven signatories, but to the real shareholders. The judgments of the other members of the Court involve the same proposition, and Baggallay L.J. formulates it thus (1): "The syndicate were, in substance, not only the vendors of the property, but also the promoters of the company, and in such a case the syndicate, as promoters, being in a fiduciary relation to the company, it was essential that the public, who were invited to become, and who were expected to become, the shareholders of the company, and to constitute the company, should have the fullest information as to all the surrounding circumstances." Again, in *In re British Seamless Paper Box Co.* (2) Jessel M.R. says: "I quite agree to this, that if promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors is approved of by the directors of the company, who are the promoters, just before the allotment or just after: in both cases it is intended to cheat the future shareholders; and of course it makes no difference whatever that the persons who, at the time the allotment was made, were in fact the promoters or their nominees, knew of the fraud. You can defraud future allottees as well as present allottees." In the same case on appeal Brett L.J. says (3): "If when parties are promoters of a company and then become directors, and at the time when they are making a profit to themselves are intending to act not only for the then members of the company but for future members, and they keep it secret, they can be made liable to account by future shareholders under the 165th section." Cotton L.J. says (4): "I should have said that if this had been an ordinary company in which there was an intention to admit new members and offer the shares to the public, the official liquidator would have been entitled to call on

(1) 5 Ch. D. 123.
(2) 17 Ch. D. 471.
(3) 17 Ch. D. 477.
(4) Ibid. 478.

the directors to account for the value of their shares. But on what principle? It is that the directors stand in a fiduciary relation to the whole company, that is, not only to the existing members, but to all whom they intend to bring in. A trustee cannot make a profit for himself without the full knowledge of all his cestuis que trust, and so the directors of a company formed in the ordinary way stand in a fiduciary relation not only to those who are members at the time but to all who may come in afterwards." It is quite clear, therefore, that if disclosure was required, disclosure to their nominees and confederates will not suffice to protect Gluckstein and his three confederates. Were the four then called upon to disclose the fact that, in addition to the profit of 40,000*l.* shewn on the prospectus, the vendors were pocketing an additional sum of 20,000*l.* out of the purchase-money payable by the company? Whether they were promoters or not in negotiating the terms of purchase of Olympia, they clearly were in a fiduciary relation to the company in adopting the contract and authorizing the payment of 180,000*l.* to themselves, and were bound not to retain any part of it over and above that which they avowed as their profit, without disclosing the fact to the company. Having constituted themselves the persons to act for the company in adopting a purchase on terms fixed by themselves, they could not here, any more than in *Erlanger's Case* (1), bind the company without a full disclosure of all facts material to the decision of the company, including therein the profit which they were making out of the transaction. See per Jessel M.R. (2) as to the duty to disclose the price at which the promoters and vendors had themselves bought. The failure to make such disclosure would, I think, clearly have entitled the company to rescind the contract confirmed by such directors. In this case there has been not only non-disclosure, but actual suggestio falsi. I think the prospectus taken as a whole, and in particular the allegations as to how the price of 140,000*l.* was arrived at, contains a representation that the 40,000*l.* added to the price covers the whole profit made by the vendors in the transaction, and the effect of that

(1) 5 Ch. D. 73.

(2) 5 Ch. D. 112.

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misrepresentation is not cured by the statement that "any profits made by the syndicate from interim investments are excluded," or by the reference among others to a contract which, without declaring that any such profit has been made, provides that they are not to be accountable should any have been or be made: see *Aaron's Reefs, Limited* v. *Twiss.* (1) It seems to me that this secret profit made payable by them to themselves out of the money of the company may be treated as an ascertained sum included in and swelling the price which, in the language of Lindley L.J. in the *Lydney Case* (2), they had "fastened" on the company for the purpose of getting paid out of it, and that as such it can be followed into their hands as in that case. The words there used exactly fit the facts before us. He says (3): "In the present case James Bird procured the company to be formed and to be managed in such a way as to transfer from the moneys of the company to himself the sum of 10,800*l.* without informing the company of that fact. The company were told that they had to pay 100,000*l.* for the property, but they did not know that of that sum 10,800*l.* was to go into the pocket of the man who had got the company up and who had in fact increased the purchase-money in order to get that 10,800*l.*" But whether the 20,000*l.* so distributed among Gluckstein and his confederates is to be deemed a secret profit as in the above case apart from that avowed in the contract of sale and in the prospectus, or as a sum of which the company was mulcted through the misrepresentation of its directors, it is equally an ascertained loss to the company by the misfeasance of its directors, and therefore recoverable by it in proceedings under the 11th section. The facts on which the claim is based are the same and are before the Court, whatever be the right way of shaping the demand for relief, and I think, therefore, that the form of the summons does not debar the company from recovering on either ground. It was contended on the authority of *In re Cape Breton Co.* (4) that, where rescission was impossible and the secret profit was in the view of the Court unascertainable, no other remedy was open to the company. But that decision, from which Bowen L.J. dissented, was not approved on that point by Lord Herschell in the House of Lords: see *Bentinck* v. *Fenn* (1); and it was afterwards explained as resting upon special facts in the *Lydney Case* (2) above cited, in a judgment to which Cotton L.J., who had given the leading judgment in the *Cape Breton Case* (3), was a party. Whether the judgment of the majority in that case can be supported on the special facts or not, it does not cover the present case. There has not been here, as there was there, an election with full knowledge to adopt the contract. There is here what there was not there—misrepresentation as well as concealment; and if the matter is to be regarded as one of damages, there can be no difficulty in concluding that the loss to the company by the directors' misfeasance amounted to not less than the amount claimed. In holding there that to give the relief claimed would be to make a new contract between the parties, Cotton L.J. clearly could not have meant to decide that in the case of a contract induced by fraud there is no remedy in damages where rescission is impossible, and yet in every such case the sum payable under the contract is in the result diminished by the amount of the damages recovered. The objection, therefore, that to enforce against a fraudulent vendor repayment of a part of the sum which in his capacity as purchaser in the name of the company he has paid to himself as a secret profit out of the purchase-money is to make a new contract, does not seem to rest on any solid foundation.

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(1) [1896] A. C. 273.
(2) 33 Ch. D. 85.
(3) 33 Ch. D. 93.
(4) 29 Ch. D. 795.

Having failed, then, in performing the duty which I have shewn is cast upon them of making full disclosure to those who are to constitute the real company, are they in any better position because they have fastened on the company a contract containing a clause absolving them from accountability? If they had set out the facts in the contract, giving only such constructive notice of its contents as they have done here, could they have relied on it as a disclosure? Clearly not. That, says Lord Watson in *Aaron's Reefs* v. *Twiss* (4), namely, the plea that a general reference to contracts is notice of their

(1) 12 App. Cas. 664.
(2) 33 Ch. D. 85.
(3) 29 Ch. D. 795.
(4) [1896] A. C. 273, 287.

contents, "appears to me to be one of the most audacious pleas that ever was put forward in answer to a charge of fraudulent misrepresentation. When analyzed it means simply that a person who has induced another to act upon a statement made with intent to deceive must be relieved from the consequences of his deceit if he has given his victim constructive notice of a document, the perusal of which would have exposed the fraud." And see some valuable observations in Buckley on Companies, p. 124, 7th ed. If such a disclosure would not defeat the right of the cestui que trust, how could the clause itself, absolving from accountability, be any more effective? It appears to me that both are equally nugatory, and may be treated as affording no protection against proceedings by the company, which has never with full knowledge confirmed the contract. I think, therefore, that the law is strong enough to reach the fund thus misappropriated, and that the defendant can be compelled to pay it.

I think this conclusion can be reached even on the assumption that the defendants were not acting as promoters in the acquisition of Olympia; but when the facts of that transaction are scrutinized, I think there is abundant evidence that they engaged in that transaction in their capacity as promoters. It was essential to their scheme that the purchaser should be some one on whom a price fixed by the adventurers could be imposed. A purchaser able to bargain and impose conditions would not have suited their purpose at all. I have no doubt that, though the syndicate agreement mentions a company "or other purchaser," they never contemplated a sale to any body but a company which should be brought into existence bound to take over the thing bought on their conditions. The "other purchaser," though mentioned, is a very shadowy figure in the syndicate agreement, and they go on to provide for the promotion of "the company," and the appointment of four of their body as its directors. The purchase of Olympia was made on February 8. But on January 19, the date of the syndicate agreement, two contracts were made by the syndicate with two of their body, the one for catering with Joseph Lyons & Co., in which two of their body were directors, the other with Hart, another of their body, for advertising, by which they in terms avow that "it is proposed to form a company which it is intended shall take subject to and with the benefit of these contracts." They then proceed to agree "so far as they lawfully can on behalf of the proposed company or other purchaser," and provide that on adoption of the contracts "by the company in such manner as to render the same binding on the company," the syndicate shall be discharged from liability. They had thus saddled the company with a caterer and an advertiser, and furnished it with a directorate bound beforehand to approve these contracts, before they embarked upon the purchase of the site upon which these operations were to be carried on. The purchase of the site was a necessary step, but only a step in a scheme which they had already begun for the formation of a company to take it over. When the so-called competition before the chief clerk is examined, it throws additional light on the transaction. It is obvious that they were not trying to buy the property at the lowest price at which it could be got, as they might have been expected to do if their intention had been to procure it in any real sense for themselves. On the contrary, their object and their act undoubtedly was to inflate the purchase price sufficiently to cover a large profit on their debenture speculation—a profit which could only be realized by finding a purchaser who would supply the funds to pay it; and such a purchaser, as I have already pointed out, could only be found in a company formed for the purpose, and equipped with a directorate bound to accept their terms. It was never intended and never contemplated that the funds should be procured from any other source. When the purchase was thus arranged, nothing remained but to find seven signatories and register the company, and if the public could be induced to find the money their purpose was accomplished. It is common ground that the defendant and his colleagues were, as they themselves avow, promoters of the company, and did every act necessary to give it existence, framed the memorandum and articles, prepared the prospectus, and generally dictated the conditions of the company's existence. There is no absolute test decisive of the precise period

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at which the character of promoter was assumed: it is an inference from all the facts—see *Emma Silver Mining Co.* v. *Lewis* (1)—no one of which, it may be, would be conclusive if it stood alone; but there is, I think, in this case clear evidence that the members of the syndicate had become promoters of the company ultimately formed before they bought the site of Olympia, and that they bought it as a step in the process of promotion. I think, therefore, that the appellant is entitled to judgment.

Solicitors: *Roderic Oliver; Lewis & Lewis.*

H. C. J.

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Jan. 28, 29; *Feb.* 23.
C. A.
May 24, 25, 26; *June* 11.

In re PERKINS.
POYSER *v.* BEYFUS.

[1897 P. 2410.]

Lease—Successive Assignments—Covenants to Pay Rent and Indemnify Assignors—Bankruptcy of First Assignee—Purchase by Lessee of Bankrupt's Right to Indemnity—Release of Bankrupt's Estate—"Property" of Bankrupt—Chose in Action—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), ss. 20, 44, 50 *sub-s.* 5, 56, 57, 168.

A lessee assigned the lease to assignee No. 1, who assigned it to assignee No. 2, each assignment containing a covenant by the assignee to pay the rent, and keep his assignor indemnified against the covenants in the lease.

Assignee No. 1 became bankrupt, assignee No. 2 died, and the lessee, who had been called upon to pay the rent, bought from the bankrupt's trustee, and took an assignment of, the bankrupt's right to indemnity, withdrawing a proof he (the lessee) had carried in, and releasing the estate of the bankrupt:—

Held, that the right of the trustee in bankruptcy of assignee No. 1 to sue the executors of assignee No. 2 upon his covenant to indemnify was "property" within the meaning of s. 168 of the Bankruptcy Act, 1883, and assignable by the trustee; and that damages in an action by the trustee against the executors would not be confined to the dividend payable to the lessee in respect of his proof against the estate of assignee No. 1, but extended to the whole amount of the obligation under the covenants to pay and indemnify entered into by such assignee;

And *held* also, upon the construction of the deed of assignment and release, that the lessee had acquired the right of the trustee to sue the executors of assignee No. 2, and that the release did not extend to all the estate of the bankrupt, but that the asset assigned to the lessee must be excluded from it.

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(1) 4 C. P. D. 396.

The judgment of North J. affirmed.

BY an indenture of lease dated October 5, 1891, a messuage and premises, being No. 11, Hanover Terrace, Regent's Park, was demised to the plaintiff E. J. Poyser for a term of nine and a half years from June 24, 1891, and the indenture contained covenants of the ordinary character by the plaintiff to pay the rent thereby reserved, and to insure the premises and to perform other obligations usual in leases.

By an indenture dated May 8, 1893, E. J. Poyser assigned the premises for the residue of the term to F. M. E. Plaistowe, and Plaistowe covenanted with Poyser that he, Plaistowe, his executors, administrators, and assigns, would pay the rent and perform all the covenants on the part of the lessee contained in the lease, and would keep Poyser indemnified against all claims and demands in respect thereof.

By an indenture dated April 1, 1895, Plaistowe assigned the premises for the then residue of the term to G. F. Perkins, who covenanted to pay the rent and perform the covenants and conditions contained in the lease, and to keep Plaistowe indemnified "from and against all actions, suits, proceedings, claims, and demands on account of any omission to pay the said rent, or the breach or non-observance of any of the said covenants and conditions."

Perkins died in December, 1895, having made a will which was duly proved by the defendants P. Beyfus and A. Beyfus, the executors appointed thereby. Plaistowe was adjudicated bankrupt on June 12, 1897, and Oscar Berry was appointed his trustee. On June 17, 1897, the executors of Perkins assigned the premises, 11, Hanover Terrace, for the residue of the term to a person who was a man of straw and did not pay the rent or perform the covenants.

The plaintiff Poyser was called on to pay, and did pay, to the lessor the amounts for which he was liable in respect of accrued rent and insurance premiums under the covenants in the lease of October 5, 1891; and he carried in a claim in the bankruptcy of Plaistowe for 1353*l.* 0*s.* 4*d.* as the aggregate of the amounts so paid by him, and the estimated amount of his liability under the covenants contained in the lease.

A compromise of this claim was agreed to between Oscar Berry, Plaistowe's trustee in bankruptcy, and Poyser, which was carried out by a deed dated August 31, 1897. This deed was made between the trustee in bankruptcy of the one part, and Poyser of the other part. It recited the facts to the effect above stated, and then proceeded as follows:—

"Whereas the said Oscar Berry has . . . . by way of compromise of the claim of the said E. J. Poyser against the estate of the said bankrupt, agreed to sell and dispose of to the said E. J. Poyser the full benefit of the said covenant on the part of the said G. F. Perkins, with the rights and powers hereinafter assigned, in consideration of the said E. J. Poyser paying to him the sum of 5*l.*, and executing such release as is hereinafter contained. Now This Indenture witnesseth that, in pursuance of the said agreement and in consideration of the sum of 5*l.* now paid by the said E. J. Poyser to the said Oscar Berry . . . . and of the release hereinafter contained, the said O. Berry, as trustee . . . . doth hereby assign unto the said E. J. Poyser the full benefit of the covenants by the said G. F. Perkins with the said F. M. E. Plaistowe contained in the hereinbefore recited indenture of April 1, 1895; with the right to recover and receive from the said G. F. Perkins, his heirs, executors, or administrators, estate or effects, and to retain for the benefit of the said E. J. Poyser, ... all and every such damages, costs, or other sums of money, if any, and to enforce for the like benefit all such other relief by way of indemnity or otherwise, as the said F. M. E. Plaistowe, his executors, or administrators, but for his bankruptcy, or the said O. Berry or other the trustee for the time being in the bankruptcy, might have been entitled now, or at any time or times hereafter, to recover or to enforce for the benefit of the said F. M. E. Plaistowe or his estate, for any breach or breaches committed or hereafter to be committed of the said covenants or any of them, or otherwise under or in respect of the liability of the said

G. F. Perkins, or his estate, by virtue of such covenants or any of them, if these presents and the arrangement hereby entered into had not been executed or made; and the right to bring, prosecute, carry on, compound, or release any action or proceeding for any such purpose, and all other rights, powers, privileges, and authorities which the said O. Berry, as such trustee, ... can lawfully transfer to the said E. J. Poyser in connection with the premises, to hold the premises unto the said E. J. Poyser, his executors, administrators, and assigns for his and their own benefit absolutely. And This Indenture further witnesseth that in further pursuance of the said agreement and in consideration of the assignment hereinbefore contained the said E. J. Poyser hereby withdraws the said proof for the sum of 1353*l.* 0*s.* 4*d.*, and releases and discharges the estate of the said bankrupt and the said O. Berry as such trustee as aforesaid from all claims and demands under or in respect of the covenants by the said F. M. E. Plaistowe with the said E. J. Poyser contained in the hereinbefore recited indenture of May 8, 1893."

This was an originating summons taken out by Poyser on November 11, 1897, under Order LV., r. 3, clauses (*a*), (*e*), and (*g*), and rule 4, against P. Beyfus and A. Beyfus, as the executors of the will of Perkins, in order to have it declared that the estate of Perkins was indebted to Poyser for the sum of 215*l.* 4*s.*, being the amount paid by him from December 25, 1896, to December 25, 1897, in respect of rent and insurance of the leasehold premises, and that such estate was liable to indemnify Poyser against subsequent payments in respect of rent and otherwise under the covenants in the lease, and in order to have administration of Perkins's estate, and consequential relief.

The defendants, the executors, admitted assets. The summons came on for hearing before North J. on January 28, 1898.

Vernon Smith, Q.C., and *Wace*, for the plaintiff. The benefit of the covenant by Perkins with his assignor to indemnify his assignor and pay the rent was "property" of the bankrupt which was effectually assigned by the trustee in the bankruptcy of Plaistowe to the plaintiff: *Seear* v. *Lawson* (1); *Guy* v. *Churchill* (2); *Howard* v. *Fanshawe.* (3) The measure of the damages that can be recovered against the estate of Perkins under the covenant is not confined to the dividend that could have been obtained from the bankrupt's estate, but extends to the whole amount that ought to have been paid by the bankrupt: *Carr* v. *Roberts* (4); *Cruse* v. *Paine.* (5) If this were not so under a covenant to indemnify only, it is so under a covenant to pay such as there is here: *Ashdown* v. *Ingamells.* (6)

Everitt, Q.C., and *Edward Ford,* for the defendants. The effect of the release by the plaintiff of all claim against the bankrupt's estate was to destroy all rights he had under the covenant for indemnity in the assignment of the lease by him to the bankrupt, and therefore destroyed all liability from the estate of Perkins to make that good. All that Perkins's estate could be liable to under his covenant would be the amount that the estate itself lost by the default in not paying the rent and performing the covenants of the lease that was at most a dividend: *In re Russell.* (7)

Vernon Smith, Q.C., in reply.

NORTH J., after stating the facts:—Then the plaintiff seeks to prove against the testator's estate. It seems to me that there is a right to prove for something beyond all question. I am not considering now what the amount payable in respect of such proof may be. It is said that there could have been no such right, because all the claim of the plaintiff against Plaistowe's estate had been released, and Plaistowe's estate could not prove for anything because all claim against that estate had been released, and Plaistowe's estate could neither make any claim in this respect, nor assign any right to the plaintiff to make a claim which but for such release Plaistowe's estate could have made. I think that there was an interest in

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(1) (1880) 15 Ch. D. 426.

(2) (1888) 40 Ch. D. 481.

(3) [1895] 2 Ch. 581.

(4) (1833) 5 B. & Ad. 78.

(5) (1868) L. R. 6 Eq. 641; (1869) L. R. 4 Ch. 441.

(6) (1880) 5 Ex. D. 280.

(7) (1885) 29 Ch. D. 254.

Plaistowe's estate under the covenants which Plaistowe had taken from Perkins that gave him a claim upon which something clearly was payable, and in respect of which there clearly was a right to prove. That right to prove would have brought something to Plaistowe's estate. It was an asset: it was a chose in action which formed part of Plaistowe's property, and the cases cited shew that the trustee of the bankrupt could sell that asset, and assign it to persons who by virtue of such assignment would have a right to sue in respect of it. The suggestion that all that could be recovered, if anything, was not the amount of the claim, but only such proportion of the claim—such a number of shillings in the pound in respect of the claim, if it could be established, as Plaistowe's estate paid shillings in the pound—seems to me to be entirely negatived by the cases that have been cited to me.

It was suggested that there could be no proof on behalf of Plaistowe's estate, or the purchasers of this asset of Plaistowe's estate, beyond the amount that actually had been paid. There seemed to me to be something in that, because it would be rather strange if Perkins's estate should pay the whole amount to Plaistowe, and then hereafter, the money not having been applied in paying off the claim of the head landlord, the head landlord might afterwards come over again against the estate of Mr. Perkins. But the question seems to be quite settled. The cases cited—*Ashdown* v. *Ingamells* (1) and *Carr* v. *Roberts* (2), and also *Cruse* v. *Paine* (3)—shew that the proof to be made in such a case is not merely in respect of what is proved to have been paid, but in respect of that which there is the obligation to pay; because the covenants are the covenant to pay and the covenant to indemnify also. My course is made clear by those cases, inasmuch as they establish the law which I must follow; and particularly *Ashdown* v. *Ingamells* (1), a decision of the Court of Appeal which seems to me exactly in point.

Then as regards the form of order, I think it should be what I suggested just now. I need not go through it again.

D. P.

(1) 5 Ex. D. 280.

(2) 5 B. & Ad. 78.

(3) L. R. 6 Eq. 641; 4 Ch. 441.

The executors of Perkins appealed. The appeal came on for hearing on May 24, 1898.

Everitt, Q.C., and *E. Ford*, for the appellants.

Vernon Smith, Q.C., and *Wace*, for the respondent Poyser.

Everitt, Q.C., in reply.

The arguments were substantially the same as those addressed to the Court below; and the following additional authorities were referred to: *Spark* v. *Heslop* (1); *Saward* v. *Anstey* (2); *Hardy* v. *Fothergill* (3); *Heritage* v. *Paine* (4); *Hodgson* v. *Wood* (5); *In re Empress Engineering Co.* (6); *Lloyd's* v. *Harper* (7); *Holmes* v. *Rhodes* (8); *Hill* v. *Smith* (9); *Lethbridge* v. *Mytton.* (10)

Cur. adv. vult.

June 11. LINDLEY M.R. now delivered the judgment of the Court (Lindley M.R., Rigby and Collins L.JJ.) as follows:—This is an appeal from an order of North J., declaring the estate of a deceased person named Perkins (1.) to be indebted to the plaintiff in the sum of 215*l.* 4*s.* paid by the plaintiff for rent and insurance of a house comprised in a lease to the plaintiff dated October 5, 1891; and (2.) to be liable to indemnify the plaintiff against future rent and insurance and damages for breaches of covenant in the same lease. [His Lordship then stated the facts of the case, and continued:—]

The appeal raises two questions, namely, (1.) whether the rights vested by the Bankruptcy Act in Plaistowe's trustee could be assigned by him to the plaintiff; and (2.) whether, having regard to the terms of the deed and the release of Plaistowe's estate, the plaintiff acquired any rights to sue Perkins's executor.

The first of these questions turns on the Bankruptcy Act, 1883. The material sections are 20, 44, 50 sub-s. 5, 56, 57 and 168, which defines "property." It is plain from ss. 20, 44, 50 sub-s. 5, and 168, and from the decision in *Hardy* v. *Fothergill* (1), that the plaintiff Poyser had a right of proof against Plaistowe's estate not only for the sums paid by the plaintiff for rent and fire insurance, but also in respect of Plaistowe's future liability under his own covenants with the plaintiff. It is also plain from ss. 56 and 57 that it was competent for the trustee in bankruptcy to compromise the claim made by the plaintiff and to assign to the plaintiff any assignable asset vested in the trustee upon the terms that the plaintiff should accept such asset in satisfaction of all demands against Plaistowe's remaining assets. It is also plain that the right of the trustee to sue Perkins's executors upon Perkins's covenant was an asset—i.e., was "property" within the meaning of s. 168, and was assignable to the plaintiff or to any one else (see s. 56 and *Seear* v. *Lawson* (2)), and that the damages in an action by the trustee against Perkins's executors would not be confined to the dividend payable to the plaintiff in respect of his proof against Plaistowe's estate: see *Cruse* v. *Paine*. (3) This disposes of the first ground of appeal.

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(1) (1859) 1 E. & E. 563.
(2) (1825) 2 Bing. 519.
(3) (1888) 13 App. Cas. 351.
(4) (1876) 2 Ch. D. 594.
(5) (1863) 2 H. & C. 649.
(6) (1880) 16 Ch. D. 125.
(7) Ibid. 290.
(8) (1797) 1 Bos. & P. 638.
(9) (1844) 12 M. & W. 618.
(10) (1831) 2 B. & Ad. 772.

The second turns on the true effect of the release contained in the deed of August, 1897. If this release is to be construed as a release by the plaintiff of Plaistowe or of his estate from all liability under his covenants with the plaintiff, then the effect will be to discharge Perkins's estate from all liability under his covenant to indemnify Plaistowe. A liability to indemnify against a liability which has no existence, and which can never arise, is a contradiction in terms. A distinction was attempted to be drawn between the covenant by Perkins to pay the rent and perform the covenant to insure on the one hand, and his covenant to indemnify Plaistowe on the other; and it was contended that, although the release might extinguish all liability on the covenant to indemnify, it did not affect the covenant to pay the rent and to insure.

Much time was spent in discussing these points and in examining such cases as *Saward* v. *Anstey* (4), *Carr* v. *Roberts* (5), and *Ashdown* v. *Ingamells* (6), and in considering

(1) 13 App. Cas. 351.
(2) 15 Ch. D. 426.
(3) L. R. 6 Eq. 641; 4 Ch. 441.
(4) 2 Bing. 519.
(5) 5 B. & Ad. 78.
(6) 5 Ex. D. 280.

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the amount of damages which could be recovered if the distinction suggested could be drawn and had in fact to be made. But in the view we take of the true construction of the deed of August 31, 1897, these questions do not arise. The release contained in the deed, although couched in very general terms, must, if possible, be so construed as not to defeat the object or purpose of the deed of which it forms part. The recitals and first witnessing part shew that the release cannot be rationally construed as extending to all Plaistowe's estate, including the asset assigned to the plaintiff. The estate released must exclude that asset. Again, the claims and demands from which Plaistowe's estate is released cannot be rationally construed as all claims and demands in respect of Plaistowe's covenants. The claims and demands released must be confined to those against the released assets, and cannot be rationally held to include those the preservation of which is essential to the recovery by the plaintiff of the asset assigned to him, and which asset he is to take in satisfaction of all demands.

In so construing the release the Court is not departing from well-settled principles applicable to the construction of such documents. General words of release are always controlled by recitals and context which shew that, unless the general words are restricted, the object and purpose of the document in which they occur must necessarily be frustrated. General words are always construed so as to give effect to, and not so as to destroy, the expressed intentions of those who use them. Good illustrations of this principle will be found in *Payler* v. *Homersham* (1), and *Lindo* v. *Lindo.* (2) In our opinion, therefore, the appeal fails on this ground also.

It is to be observed that North J. has merely given the plaintiff liberty to apply in respect of future breaches of covenant. He has not impounded assets to meet them, nor attempted to estimate damages in respect of them. The order is right both in substance and in form, and the appeal must be dismissed with costs.

Solicitors: *Beyfus & Beyfus; E., F. & H. Landon.*

(1) (1815) 4 M. & S. 423.

(2) (1839) 1 Beav. 496.

W. W. K.

WARD *v.* MAYOR OF THE BOROUGH OF PORTSMOUTH.

[1896 W. 2515.]

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1898
June 10, 11, 16.

Burial Ground—Purchase of Addition to Burial Ground—Approval by Secretary of State—Burial Act, 1852 (15 & 16 *Vict. c.* 85), *ss.* 25, 26—*Burial Act*, 1853 (16 & 17 *Vict. c.* 134), *s.* 6.

The burial board of Portsmouth, where by Order in Council no new burial ground was to be opened without the previous approval of one of the Secretaries of State, contracted in 1889 with the consent of the vestry for the purchase of a piece of land for the purpose of adding to their existing cemetery. The purchase was not to be completed till June, 1896. In the meantime no interest was to run, and the vendor was to be at liberty to remove the clay and make bricks on the land. In 1895 the property and liabilities of the board were transferred to the corporation. Shortly before the time for completion the corporation applied to the Home Secretary for his approval of the land as a burial ground, which he refused to give. The corporation then declined to complete, and the vendor sued for specific performance or damages:—

Held, by the Court of Appeal, affirming the decision of Byrne J. on this point, that s. 6 of the Act of 1853, which provides that no new burial ground shall be "provided and used" within the limits there specified without the approval of a Secretary of State, applied to an addition to an existing burial ground.

But held, reversing the decision of Byrne J., that the section did not prohibit the contracting to purchase land with the consent of the vestry for the purpose of a burial ground without the approval of a Secretary of State, and that the contract was binding and the vendor entitled to damages for the breach of it, he not insisting on specific performance.

THE burial board for Portsmouth was constituted under the Burial Act, 1853, in pursuance of an Order in Council dated March 29, 1854, which provided that no new burial ground should be opened in Portsmouth without the consent of one of the Secretaries of State. The board provided a cemetery which was opened in 1854 with the consent of the Secretary of State. Being desirous of securing land for the future enlargement of this cemetery, the board entered into an agreement dated August 1, 1889, with the plaintiff, that the plaintiff should sell and the board purchase certain land adjoining the cemetery for 6270*l*. to be paid as follows: 100*l*. on or before the signing of the agreement, and the residue on June 24, 1896, when the purchase was to be completed; and if the purchase was not completed on that day, the purchasers were to pay interest at 5*l*. per cent. from that time till completion. The vendor, till the time fixed for completion, was to be at liberty to dig the brick earth to a depth of four feet on the northerly part of the land, and to a depth of 2 ft. 6 in. on the southerly part, and to manufacture and store bricks on the land, and to occupy or let the same as he should think fit.

No immediate addition to the cemetery was at that time required, but the land in the neighbourhood was being laid out for building, and unless a purchase was made at that time it was thought unlikely that land for an addition could afterwards be acquired.

On January 1, 1895, the town council of Portsmouth, acting as the urban sanitary authority for the district of the borough, in exercise of the power given by s. 62 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), resolved that the powers, duties, property, debts, and liabilities of the burial board should be transferred to such council as from March 31, 1895.

On March 19, 1896, the time for completion drawing near, the town council applied to the Home Secretary to know whether he would approve of the land as a burial ground. On April 21, 1896, a letter was received from the Home Office stating that, as the Secretary of State was advised that the site in question was unsuitable for use as a burial ground on account of the proximity of a large number of dwelling-houses, he was unable to sanction the proposed extension.

After some fruitless negotiations as to the abandonment of the contract, the plaintiff commenced his action against the corporation, claiming specific performance of the agreement, or, in the alternative, damages for breach of it. The corporation by their defence pleaded that it would have been an illegal act and ultra vires on their part to complete the contract, or to purchase any land which could not lawfully be used as a burial ground, which this could not be, as the Secretary of State had refused his approval.

The action was tried by Byrne J., who held that an addition to an existing burial ground stood on the same footing as a new burial ground, and that in the enactment that no new burial ground should be "provided and used" without the approval of the Secretary of State, the word "provided" must be taken as including "acquiring," for that otherwise no meaning was given to the word "provided," and the section would have to be read "shall be used." His Lordship, therefore, held that the contract was one which could not be enforced, and dismissed the action.

The plaintiff appealed.

Warmington, *Q.C.*, *Astbury*, *Q.C.*, and *Methold*, for the appellant. This land was purchased under the powers of the Burial Act, 1853 (16 & 17 Vict. c. 134), which applies to the country at large many of the provisions of the Burial Act, 1852 (15 & 16 Vict. c. 85), including ss. 10 to 42. Sect. 25 directs a burial board to provide a burial ground, and by s. 26 the board for that purpose or for making additions to an existing burial ground may, with the consent of the vestry, purchase land. Sect. 6 of the Burial Act, 1855 (18 & 19 Vict. c. 128), gives an appeal to the Secretary of State if the vestry refuse their consent. The contract on which we sue is a contract for the purchase of land adjoining the cemetery with a view to its future enlargement. The first question is whether the prohibition in s. 6 of the Act of 1853 applies to an addition to an old cemetery. The second, whether, if it does apply, it furnishes any defence to this action, or, in other words, whether it forbids the purchase of land without the approval of the Secretary of State with a view to its being used as a burial ground. If that section does not forbid a purchase the contract is valid; the purchaser takes his chance whether he will be allowed to use the ground for the purpose for which he has bought it, and if he wished to make the purchase conditional on his being allowed to use the ground as a burial ground he should have made that a term of his contract. Unless the contract is void ab initio, the not being able to use the land for the purpose for which it is bought is no defence to an action for damages, though it may in some cases be a defence to a suit for specific performance: *Eastern Counties Ry. Co.* v. *Hawkes* (1); *Adams* v. *Weare* (2); *Baily* v. *De Crespigny*. (3) Sect. 28 of the Act of 1852 enables a burial board, with the consent of the vestry, to sell any land which they have purchased, and in which no interments have taken place; so our contention involves no hardship. Sect. 6 of the Act of 1853 does not mention purchase, but says that no new burial ground shall be "provided and used" without the approval of the Secretary of State. Providing and using are not the same thing as purchasing. Purchasing land is not providing a cemetery, though it is a necessary step towards it. The Acts use the expressions "buy lands" and "provide a cemetery," but never say "provide land." If the consent of the Secretary of State was required to a purchase, why was it not inserted in s. 26? Sect. 6 of the Act of 1855 would be absurd if the consent of the Secretary of State to a purchase was requisite. Sect. 28 of the Act of 1852 evidently contemplates a purchase with a view to future using, and the Acts as we construe them form a reasonable scheme, since, if ground could only be bought when wanted for immediate use as a cemetery, the board, having no compulsory powers, would be at the mercy of landowners. The other point, whether s. 6 applies, is of less importance; but it is to be observed that ss. 25 and 26 of the Act of 1852 speak of a burial ground, or an addition to a burial ground; but s. 6 of the Act of 1853 requires the approval of the Secretary of State to the providing and using a "new burial ground" only. This we say is not a new burial ground, but an addition to an old one. The section only applies within a district where there has been an Order in Council that no new burial ground shall be opened without consent. When once consent has been given and a new burial ground opened, why should not the burial board thenceforth be on the same footing as other burial boards, and require no further consent from a Secretary of State. A burial board can only buy for the purpose of providing a cemetery, but it was intended that they should look to the future and buy land while it can be had.

(1) (1855) 5 H. L. C. 331, 349.
(2) (1784) 1 Bro. C. C. 567.
(3) (1869) L. R. 5 Q. B. 180, 185.

[Lindley M.R. My difficulty is whether land purchased for the purpose of a cemetery is not "provided."]

It cannot possibly be said that it is "provided and used," which are the words of s. 6 of the Act of 1853. "Used" means used for burying in: *Lord Cowley* v. *Byas*. (1) The plaintiff does not insist on specific performance—he will be satisfied with damages.

Robson, Q.C., *Eve, Q.C.*, and *George Williamson*, for the corporation. A burial board cannot buy land except for the purpose of a cemetery, and they cannot use it as such without the consent of the Secretary of State. It is reasonable, then, that his consent should be required before buying, otherwise the board might enter into a land speculation. This explains the use of the word "provide." In the Burial Act, 1855, s. 6, it appears to be confined to "purchasing," and in all cases it must include it. The appellants seek to deduce from s. 26 the conclusion that because "provide" is there used as well as "contract for," the word "provide" does not in other sections include a contract. If s. 6 of the Act of 1853 does not prohibit purchasing without the consent of the Secretary of State, the words "provided and" are made superfluous: the section ought to have run simply "shall be used." "Provide" includes all the steps necessary for forming a burial ground—purchase, laying out, consecration, and offering to the public.

[Collins L.J. referred to s. 23 of the Act of 1852.]

It is difficult to infer from that that providing is something different from taking and holding.

[Lindley M.R. referred to s. 29 of the Act of 1852 as requiring a third approval.]

That only applies to a case in which a third party is interested. The provisions of s. 10 of the Act of 1852 that a copy of the resolution to provide a burial ground is to be sent to the Secretary of State confirms the view that his consent to the proceedings of the board is requisite.

Astbury, Q.C., in reply. One of the meanings of "provide" given in the dictionaries is "supply," and the word is never used in the Acts as synonymous with "purchase." In s. 25 of the Act of 1852 "provide" is clearly used in the sense of "supply." Sect. 26 gives the power to purchase land as a preliminary to providing a burial ground: they are to purchase land and form it into a cemetery that they may be in a position to provide a cemetery. Sect. 28 enacts that they may sell, not any "burial ground," but any lands purchased under the Act which are not wanted for a burial ground. Taking these sections together, the board may buy land, form a burial ground, and sell what is not wanted for a burial ground. This is borne out by s. 30: "purchase" is always connected with "land," "provide" with "burial ground." Sect. 9 of the Act of 1852 and s. 6 of the Act of 1853 prohibit a composite act, and there is no breach of the prohibition unless the burial ground is both provided and used without the requisite approval. According to the argument of the respondents, it would be an offence to accept a gift of land for a burial ground without the consent of the Secretary of State. Sect. 20 of the Act of 1852 shews that when a joint consent was required the framers of the Act knew how to express it. Sect. 6 of the Burial Act of 1855, which gives an appeal to the Secretary of State from a refusal of the vestry, enacts that acts done under his order shall be as good as if done with the approval of the vestry, which assumes that they would have been good if done with the approval of the vestry. Under the Act of 1852 land outside the two-mile limit could have been purchased and used for metropolitan burials without the consent of the Secretary of State, for it would not come within the terms of s. 9; so the respondents must put a different construction on s. 26, according as the land is or is not within the two-mile limit. A power to acquire land is given by s. 42 of the Act of 1852, and it is not contended that this requires the sanction of the Secretary of State. We rely mainly upon the plain and unequivocal language of s. 26, which gives power to purchase with the consent of the vestry, and we say that a provision that the burial ground shall not be used without the consent of the Secretary of State cannot cut it down.

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(1) (1877) 5 Ch. D. 944.

LINDLEY M.R. This case has been before us so long, and we have all had such a full opportunity of looking through the

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Acts of Parliament, that I do not think anything would be gained by taking time to consider our judgment.

The facts of the case are not really in dispute. I will state them very shortly. After an Order in Council had been made closing the cemetery in Portsmouth, a new cemetery was duly acquired. Then it was thought necessary, or at all events desirable, to obtain a piece of land of about 8¼ acres as an addition to the cemetery. I will call it an additional burial ground; and in 1889 the burial board for the district, with the consent of the vestry, entered into an agreement with the present plaintiff, Mr. Ward, to purchase from him these 8¼ acres for a sum of over 6000*l.*, upon the terms that the burial board should pay a deposit of 100*l.*, and that the purchase should be completed at Midsummer, 1896, that is to say, about seven years after date; and there was a provision in the agreement that in the interval he might take the clay off the land. That means in substance that, in the opinion of the burial board, there was an opportunity for then acquiring upon what they thought satisfactory terms some land for an additional burial ground which they did not want to use at that time for burial purposes, but which they saw they would want, and they availed themselves of the opportunity. In 1895 the functions of the burial board became vested in the Portsmouth Town Council, who were advised that they could not make use of this piece of land for burial purposes without the sanction of the Secretary of State. They applied to the Secretary of State for his sanction, and he refused that sanction. That has put the Portsmouth Town Council in a position of considerable difficulty. They did not enter into this contract, but they find themselves hampered with it. Mr. Ward says, "You are bound by this contract; you must specifically perform it, or at all events pay me damages for the loss I shall sustain if you throw it up." The Portsmouth Town Council say, "We are very sorry; we should be glad to use this for burial purposes, but we cannot get the necessary sanction of the Secretary of State." Hence this litigation; and what we have to consider is the question whether the sanction of the Secretary of State ought to have been obtained by the burial board when they

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entered into this contract. If the sanction of the Secretary of State was essential to the validity of the contract, of course the decision appealed from was right. If, on the other hand, it was not necessary to the validity of the contract, if the necessity of obtaining the sanction of the Secretary of State only arose afterwards, then, whatever defence there may be to an action for specific performance, there is none to an action for damages.

Was, then, the sanction of the Secretary of State necessary in order to render the contract sued upon a valid contract? That turns upon the various Burial Acts which have been called to our attention, and in particular upon the meaning and effect of s. 6 of the Burial Act of 1853, which I will read: "Where by any such Order in Council as aforesaid it is ordered that no new burial ground shall be opened in any city or town, or within any limits therein mentioned, without the previous approval of one of Her Majesty's principal Secretaries of State, no new burial ground or cemetery (parochial or non-parochial) shall be provided and used in such city or town, or within such limits, without such previous approval."

Now, in order to understand the meaning of the Act of 1853, which extends the Burial Act of 1852 with some modifications to the whole of England and Wales, it is absolutely necessary to understand the Act of 1852. We must understand not only the objects of that Act, but the machinery provided by it; and I proceed, therefore, to address myself to this Act of 1852, and see if we can ascertain the meaning of a similar prohibition which is to be found in that Act. Sects. 2 to 8 of the Act of 1852 provide for closing burial grounds where the continued use of them may be injurious to public health. This part of the Act introduces the Secretary of State and Orders in Council. Sects. 9 to 32 relate to the providing of new burial grounds. By s. 9 no new burial ground can be "provided and used" (these are the words which occur in the later Act and with which we have to deal) "without the previous approval of one of Her Majesty's principal Secretaries of State." The effect of that prohibition on the rest of the Act of 1852, which introduces the machinery for providing new burial grounds, cannot be understood without examining various other sections. In order to provide a new burial ground, it is first of all necessary to constitute some authority to provide it, and that is done by ss. 10, 11, 12, and 24. The first step is to convene a meeting to consider whether a burial ground shall be provided; and, if it is resolved to provide one, s. 10 enacts that a copy of the resolution shall be sent to the Secretary of State; but no approval by him of the proceedings is required, and if the resolution is passed then a burial board is to be formed. We have had an argument addressed to us as to the object of transmitting to the Secretary of State a copy of that resolution. No doubt the object of it is that he may be informed of what is going on; but the Act does not say a word about what is to be done on the resolution being transmitted. That direction was complied with. When the burial board is formed under s. 11 it is incorporated by s. 24. Then, as soon as the burial board is formed, it is, by s. 25 of the Act of 1852, to *provide* a burial ground. I lay emphasis on the word "provide" because that is the word with which we have to deal. This providing necessarily involves obtaining or appropriating land for the purpose, and s. 24 authorizes the board to take and hold land for the purpose. That section, therefore, enables the board to accept a gift of land from any one who may be willing to make such a gift. But s. 26 empowers the board, with the consent of the vestry, to buy land for providing a burial ground; and s. 29 enables it, with the consent of the vestry and the guardians, to appropriate parish land for the purpose of a burial ground. By s. 30 the board is empowered to lay out and embellish any burial ground provided by the board, and to build a chapel on any land purchased or appropriated for a burial ground; and such burial ground may be consecrated when in a fit and proper condition for interment. Then comes a proviso which is worth referring to: "in providing any burial ground such board shall set apart a portion thereof which shall not be so consecrated as aforesaid." Supposing all this to be done, the land does not (s. 32) become the burial ground of the parish until the bishop has consecrated it, or, if no consecration is necessary, has fixed a time for its becoming such burial ground. When all that is done, when land is acquired, when it is made fit for the purpose, and when it is consecrated, then, and not before, there is a complete burial ground. I pass over for the present the question, what do the words "providing a burial ground" mean? Provision is made by s. 23 for providing burial grounds for several parishes, and by s. 20 for borrowing money, with the sanction of the vestry and the Treasury, for providing and laying out burial grounds and building chapels upon them. Then by s. 28 the board is empowered, with the approval of the vestry, to sell land purchased by the board under the Act and in which no interment has been made, and which the board may consider proper to be sold. These, I think, are all the sections of the Act of 1852 which we need consider on the present occasion.

Such being the scheme of that Act, I return to the prohibition contained in s. 9 of the same Act. The word "provide" as applied to new burial grounds clearly in some cases includes purchase, e.g., under s. 20 money may be borrowed for providing a burial ground, which must include buying; and so in s. 25, as regards access, the word "providing" seems to include buying. But "buying" and "providing" are not synonymous expressions. "Providing" may include "buying," but it must include "acquiring"; you cannot provide a thing without acquiring it, but a burial ground may be acquired without buying. The words "in providing," which occur in the proviso in s. 30 to which I have already alluded, can hardly mean buying or acquiring. They point to a later stage in the process of rendering the land referred to fit for a burial ground. The process of providing a parochial burial ground begins with acquiring it, and ends with its consecration or the appointment by the bishop of the time fixed for its becoming a burial ground. Now, s. 26 clearly authorizes the purchase of land out of the metropolis and beyond the two miles' limit without the consent of the Secretary of State. The question is whether the consent of the Secretary of State is necessary for the purchase of land within those limits. When we turn back to s. 9, and consider the language of the prohibitions contained in it, I cannot think that it prevents a burial board from taking the first step towards providing a burial ground without the sanction of a Secretary of State. The Secretary is put in to protect public health, and the prohibition against "providing and using" effects every useful purpose if it is held to apply to some later step than the first in the process of providing. Byrne J. was impressed by the difficulty that unless the prohibition includes acquiring, that prohibition might just as well have been confined to "using." But, feeling as I do the full force of this observation, I feel greater difficulty still in cutting down the plain language of ss. 26 and 29, which are addressed specifically to the first step in providing a burial ground, namely, buying land or setting apart parochial land for that purpose. Upon the Act of 1852, the only conclusion at which I can arrive is that a burial board can buy land or appropriate parish land, or accept a gift of land for the purpose of a burial ground, without the preliminary sanction of a Secretary of State, and that whatever "providing" means in s. 9, the prohibition there contained does not extend to the acquisition by purchase or otherwise of land for a burial ground. The prohibition, be it observed, is not against "acquiring," but it is against "providing and using"—an expression which is not without significance. So much for the Act of 1852.

I pass on to the Act of 1853, which extended the Act of 1852 to places to which that Act did not apply. The prohibition contained in s. 6 of the Burial Act of 1853 is a mere repetition of and is open to the same observations as s. 9 of the earlier Act. I say it is a mere repetition, although it is not exactly worded like it, but it is obvious that all the observations I have made on the earlier section apply to this. It is urged before us that s. 6 of the Act of 1853 did not apply to new additions to burial grounds as distinguished from new burial grounds. Having studied the Act of 1852 and the Act of 1853 together, I am unable to assent to that argument. I think that if the plaintiff's case turned on that and that alone he would fail.

The Burial Act of 1855 amends the two former Acts, but I do not think it throws much light on the construction of the prohibitory sections contained in them. The end of s. 6 of the Act of 1855 tends to shew that the consent of the Secretary of State is not wanted for purchasing, if they do not want to borrow under s. 30 of the Act of 1852; and s. 17 of the Act of 1855, which enables burial boards with the sanction of the Secretary of State to let land purchased for burial purposes and not consecrated, and in which no interment has taken place, shews that land may be held for a lengthened period before being consecrated or used. That really exhausts the difficulties of this case.

I have looked at this case rather narrowly in order to discover if I could the meaning of the expression "provided and used"; but when we look at it more broadly, it appears to me that the defect in the case of the defendants is this. It is obvious, I think, from these Acts that the Secretary of State is brought in for the protection of the public health, and not at all for financial reasons. The financial part is left to the Treasury when the board wants to borrow money, and although the Secretary of State is brought in by the clause in the Act of 1855 as to letting, there are indications, I think, in the Act of 1855 itself which shew it was never supposed that his control was required for the expenditure of money. The check that is put by this Act upon the expenditure of money for purchasing is the consent of the vestry, and the Secretary of State, to my mind, has nothing whatever to do with it. If the broad view be adopted that his sanction is rendered necessary by Parliament for the purpose of protecting the public health, full effect can be given to that by holding that the prohibition does not apply so early as the acquisition of land, especially when, as in this case, an opportunity may occur for acquiring land for burial purposes although it may not be wanted for interment for some years. I cannot suppose for a moment that if the burial board in this case had applied to the Secretary of State for his sanction to the purchase of land for a burial ground not to be used till seven years hence he would have entertained it for a moment. He would say, "Do not come to me now; come to me when you want to use it. I have to look after the public health. I cannot tell what may be necessary seven

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years hence for the protection of the public health." There is nothing, then, to invalidate the contract of purchase; the vendor need not trouble himself about the fact that the burial board may not obtain the sanction of the Secretary of State to use the land as a burial ground; the risk of not getting that sanction must be run by the purchaser, and not by the vendor. I think Mr. Warmington was right in his observations upon that point.

Now, as regards the remedy. If the plaintiff here pressed for specific performance, his demand would require some consideration, because, although the contract is valid, there are practical difficulties which arise, and as the present defendants were not the contracting parties there might be some little difficulty. The plaintiff, however, does not insist upon specific performance, but will be content with damages; and it appears to me he is entitled to them. The result, therefore, is that the appeal must be allowed, with costs here and below, and there must be an inquiry what damages the plaintiff has sustained by reason of the breach of the contract by the defendants, and an order for the payment of those damages to the plaintiff when ascertained.

CHITTY L.J. The question on this appeal is whether the contract of 1889 is void as being beyond the powers of the burial board which entered into it. After the careful analysis that the Master of the Rolls has presented of the Burial Acts, it is needless for me to go through the sections again. I shall only add a few words upon what appear to me to be the principal points in this case.

It is urged by the respondents that the approval of the Secretary of State is required ex post facto to validate this contract, and that, inasmuch as his approval has been refused, the contract not only cannot be enforced by specific performance, but is altogether void. The 26th section of the Act of 1852 is clear as it stands by itself. It gives power to a burial board to contract for the purchase of land for the purpose of providing a burial ground, and there is one condition only imposed by that section, namely, the obtaining the approval of the vestry before the contract is entered into. That approval has been obtained; consequently, there is a clear and clean power conferred upon the burial board by this 26th section. Now, it is quite true that in complicated Acts of Parliament—and certainly these are not free from complication nor easy to construe—we may find that there is some other fetter imposed than what appears at first sight; but after carefully considering the case, I think that there is no other condition with which this power to purchase is clogged. I accept what the Master of the Rolls has stated as being the two leading ideas in the Act of 1852—the one is finance, and the other is public health. Speaking without regard to some of the smaller details, the Secretary of State is invoked for the purpose of protecting the public health; but the question of finance is not left to him. By the 26th section the question of finance is left to the vestry, whose approval is required. It is plain that under the 28th section the burial board has power, with the approval of the vestry, to sell without the sanction of the Secretary of State any land that has been purchased. The Secretary of State is not called in here, and there is no ground for saying that he can interfere in the matter. There is a fetter imposed by this section which is quite immaterial for the present purpose. Until the land has been consecrated or has been actually used for the purpose of interment, a power of sale corresponding to the power of purchase is vested in the same body with the same approval. That, I think, goes a long way in explaining the force and effect of the 26th section. And as ancillary to this I refer to the later Act of 1855, which contains a power of letting; that, I think, is a subordinate matter, but it shews that the burial board can make use of this land for other purposes than merely for simple interment. There might be danger in confiding to a burial board a power to speculate in land; and if it had been shewn that they bought this land merely as a speculation, I think the case would have stood very differently. But, so far from that being the case, it is shewn that they bought it with a view to converting it into a burial ground; and it is obviously of advantage to bodies thus placed, and particularly in districts where the population is increasing, that they should have some power of making provision beforehand for the event of the existing burial ground becoming too small for the requirements of the neighbourhood. It is equally obvious that a body, such as a burial board, can never buy exactly the quantity of land they require for the immediate purpose of converting it into a burial ground. They must of course have ground unused. The result is this—that they can buy beforehand with a view to proper economy in the execution of the duties that are entrusted to them. In my opinion, they would not reasonably go to the Secretary of State, as according to the case for the defendants they ought to have done, and ask for his consent, under the 6th section of the Act of 1853, at the time the contract was entered into. Had they done so, I take it that his answer would have been, "No, I cannot tell now what will be the state of things with regard to health six or seven years hence; it may then be a matter for my successor, and not for me, to consider." As has been pointed out, and it assists the main argument, a burial board may accept gifts of ground; and it is quite plain that the Secretary of State's sanction is in no way required for the acceptance of such gifts. The argument has largely turned on the meaning of the words "provide and use" in the 6th section of the Act of 1853. After hearing the arguments and devoting my utmost attention to the various and numerous places in which the term "provide" occurs throughout these Acts of Parliament, I am by no means satisfied that the Legislature has used that term in any strict or technical sense. There is a want of uniformity in the various phrases in which it is used, and I think I am at liberty to say after that observation that I have not an absolutely clear view of what is meant by "provide." I think, however, that I can get sufficiently near it for the purposes of this case. It is, in my opinion, the doing something to the land after the contract of purchase—how much it is not necessary to say; but I am satisfied that the word "providing" in the 6th section is not equivalent to purchasing by contract. Probably the term "opening" is a fairly rough mode of describing what is meant; but it is not necessary to say exactly what is meant—it is only necessary to say, as I do say, that it is not equivalent to purchasing under the 26th section. Mr. Robson in his very able argument, and I think Mr. Eve supported the same proposition, spoke of "providing" as consisting of a series of steps. I think there are a series of steps before you can get a ground provided; but the first ordinary step, not the absolutely necessary first step because gifts may also be made, would be the purchase by the board itself.

Upon these general grounds, and acceding as I do to the analysis which the Master of the Rolls has carefully presented of the clauses of the Acts of Parliament, it appears to me that this contract was not ultra vires when it was entered into; and there is no question raised, as I understand, in regard to the liability of the defendants, who are the successors of the board who entered into it; and consequently I agree with what the Master of the Rolls has said with reference to the result of this appeal.

I do not understand that the defendants make any objection to damages in lieu of specific performance, and by the position they occupy as successors (although our attention has not been called to the Act of Parliament making them such) they are for all practical purposes in this suit in the same position as the burial board which entered into the contract.

COLLINS L.J. I am of the same opinion. After the elaborate and complete examination which the statute has received at the hands of the Master of the Rolls, I propose to add very few words—in fact, I should say nothing but for the fact that we are differing from the very careful and elaborate judgment of the learned judge in the Court below.

Arguments, no doubt, may be derived from a minute examination of the wording of each of the several sections in these Acts of Parliament; but those arguments are at the best inconclusive, and many of them are two-edged; and, therefore, what we have to do is to see if we can find a broad principle lying at the bottom of these enactments. It is clear, I think, that the paramount consideration in these Acts is the protection of the public health. Sect. 1 of the Act of 1853 is in terms stated to be based on considerations of health, and following on that come provisions for closing existing burial grounds and for dealing with those which are hereafter to be opened. We had in existence at the date of the Act the old common law body, the vestry, and that vestry composed of ratepayers was capable of looking after its own financial interests; and I have no reason to suppose that the Legislature in the scheme of this legislation desired to superadd any additional restrictions upon their financial operations. Then, in that part of the Act of 1852 which is extended beyond the metropolis by the Act of 1853, I find (s. 10) a provision for a meeting of the vestry being called, and a resolution of the vestry being passed that it is desirable that a burial ground shall be provided. That is done by the vestry. Then I find in the 26th section an absolute provision for enabling the burial board, with the approval of the vestry (there is no other condition imposed), to contract for the purchase of land for the purpose of a burial ground. So far there is an absolute power vested in the burial board to contract with the consent of the vestry. But it is said that that power has been controlled by a fetter put upon it which imposes as a condition precedent to the making of any contract the consent of the Secretary of State. That provision is in the 6th section of the Act of 1853, which extends to the area now in question the prior provision in s. 9 of the Act of 1852, which is the one I am now reading: "No new burial ground or cemetery (parochial or non-parochial) shall be provided and used in the metropolis, or within two miles of any part thereof, without the previous approval of one of Her Majesty's principal Secretaries of State." The words are "provided and used," and we are asked to say that under those words it is a condition precedent to the contracting for and purchasing the site of a proposed burial ground that the sanction of the Secretary of State shall be obtained. I cannot find it in the words, because the words are "provided and used." The thing done is the contract to buy. I cannot find it in the words, and I do not find it in the sense or in the supposed purpose of the Legislature. As I have pointed out, what the Legislature is providing for is not the financial arrangements, which are alone concerned in the purchase, but for the sanitary arrangements which are in

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jeopardy when and not until it is proposed to open land which has been bought, and turn it into a burial ground. But it was argued that we must suppose that the Legislature intended the Secretary of State to supervise the financial as well as the sanitary arrangements. I think one argument is conclusive that that is not the case, because, as was pointed out by Mr. Robson, who made the point, this provision making the consent of the Secretary of State a condition precedent does not apply when the proposed purchase is outside the limits named in the section, namely, "in the metropolis or within two miles of any part thereof." If the object of the Legislature was to safeguard the financial arrangements of the vestry, why should they not have safeguarded them as much outside the metropolis as in it? No reason can be suggested why. The financial considerations are the same, but the sanitary considerations are different; and, therefore, to the sanitary considerations, and to those alone, in my judgment, the Legislature has addressed this section.

Now let me say a few words as to whether what was done in this case is that which we may deem the Legislature to have contemplated. I gather from more than one section (I need not refer to them in detail) that the Act did contemplate a burial board acquiring land more than sufficient for their needs for the time being. There are two sections which can be pointed to at once. There are others which could be referred to if necessary which shew that that is necessarily so. There are the provisions in the 28th section empowering them to sell lands which have been acquired, but which have not been used for the purpose of interments; there is also the 17th section in the Act of 1855, which provides for their letting with the sanction of the Secretary of State lands not for the time being required for the purposes of a burial ground. Therefore the Legislature does contemplate their being in possession, through the machinery of the Act, of land more than sufficient for the purposes of interment.

Now, is it reasonable to insist that on each occasion when the vestry or the burial board has a favourable opportunity of buying land they should limit the purchase to so much land only as for the time being is required, and that to that and that only they should direct the consideration of the Secretary of State? It seems to me that there would obviously be in this a practical inconvenience so great that I cannot conceive that the Legislature could have intended it. Let me take a common case. There is in the market a piece of land which is admittedly eligible for the purpose of a burial ground; but it is larger than is required for present needs, and there is no possibility of buying only a part of it—it must be all bought or none. It may be an exceedingly useful and prudent thing for the burial board to secure it; but if the assent of the Secretary of State is a condition precedent to the acquisition of that land, he would be obliged at the time when it is contemplated to purchase to determine whether on sanitary considerations it is desirable that it should be opened. I may point out that if he has once given his consent to it, the provisions for closing burial grounds under the Burial Acts no longer apply to that area: that is enacted by s. 7 of the Act of 1852 and s. 5 of the Act of 1853, which bar the closing of any new burial ground provided with the approval of the Secretary of State. There may be other means of dealing with it, but the short, simple, and summary means on sanitary grounds of closing burial grounds do not apply when he has once given his approval. It would be so large a responsibility to impose on the Secretary of State to forecast as to whether in future it may or may not be advisable that burials should go on in that place, that he would be practically bound to limit his assent to cases where only just a sufficient amount of land for the immediate requirements of the board was contemplated in the proposed purchase. I think that would be so great a public inconvenience that if it existed it would have to be remedied, and I find no words in the Act that point to it; but I find other words which clearly contemplate that the burial board may find itself in possession of more land than it wants, and leave is given to let or to sell it. I cannot doubt that the course taken by the burial board in this case is one that comes within the general scheme of the Legislature. That being so, it seems to me there is clear specific authority given to them to purchase with the consent of the vestry. But when I look at the

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supposed condition which fetters that, it does not in terms constitute a condition precedent to the purchase, and cannot be supposed to be intended to do so. When I look at the principle, and when I look at the words of this section and test it by a test suggested in argument, namely, if criminal proceedings were taken under this 9th section against a burial board which had "provided," in the sense of purchasing, but had not "used," without the consent of the Secretary of State, a burial ground, could it be contended for a moment that an indictment based on that section leaving out the word "used" could be sustained? It seems to me clearly it could not. That is only one way of testing the question whether or not the governing word in that section is "used," and whether something antecedent both to provision and user, namely, purchase, comes within it at all. I agree it is partly embraced in the word "provided"; but, as was pointed out by Chitty L.J., although it is an essential part, it does not exhaust the provision, and, not exhausting it, it cannot be said that the person who has purchased has "provided."

I agree, therefore, that this appeal must be allowed.

Solicitors: *Rowcliffes, Rawle & Co., for Cousins & Burbidge, Portsmouth; Williamson, Hill & Co., for Alexander Hellard, Portsmouth.*

H. C. J.

In re WOODS AND LEWIS' CONTRACT.

C. A.
1898
June 6.

Vendor and Purchaser—Contract for Sale of Lands—Delay in Completion—Defect in Title unknown to Vendor—"Default"—Interest.

A clause in a contract for the sale of lands provided that, if from any cause whatever other than the "default of the vendor," the purchase should not be completed by the day fixed, the purchaser should pay interest until completion. Upon investigation of the title a defect in it was discovered by the vigilance of the purchaser's advisers, which was not known to or suspected by the vendor when he entered into the contract, and the time occupied in remedying the defect delayed the completion of the purchase for nearly three months after the day fixed. The purchaser did not have, and keep, his money ready at the proper time, making no interest of it:—

Held, affirming the decision of Romer J., [1898] 1 Ch. 433, that, there being no want of reasonable care on the part of the vendor and no abstention from doing anything that he ought to have done, the delay was not attributable to his "default," and that the purchaser must pay interest until completion.

In re Young and Harston's Contract, (1885) 31 Ch. D. 168, 174, and *Williams* v. *Glenton*, (1866) L. R. 1 Ch. 200, observed upon by Collins L.J.

APPEAL from a decision of Romer J. See [1898] 1 Ch. 433, where the facts and arguments are fully reported.

Stated shortly, the question before the Court arose upon a summons under the Vendor and Purchaser Act, taken out by a vendor of leasehold hereditaments in order to establish his claim under the contract of sale to interest upon the unpaid residue of the purchase-money from August 31, 1897, the day fixed by the contract for completion, to November 24, 1897, when the purchase was actually completed.

Clause 10 of the contract provided that "if from any cause whatever other than the default of the vendor" the purchase should not be completed on August 31, 1897, the purchaser should pay interest on the residue (after payment of the deposit) of the purchase-money from that day until the completion of the purchase.

The contention in support of the summons was that the delay in completion was entirely due to the time occupied in remedying a technical defect in the title not known to or

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suspected by the vendor (on whose part there was no want of reasonable care) at the time the contract was entered into, but discovered during the investigation of the title by the vigilance of the purchaser's professional advisers; and that delay arising from such a cause did not constitute "default" within the meaning of clause 10 of the contract, so as to deprive the vendor of his right to interest from the day fixed by the contract until the actual completion.

The purchaser, on the other hand, contended that the delay had arisen from the default of the vendor, who was bound to know, and must be treated as having known, of the defect in his own title, and whose duty it was to deliver a proper abstract; and his counsel relied on *In re Young and Harston's Contract* (1) and *In re Hetling and Merton's Contract.* (2)

It appeared that the purchaser did not have his money ready at the time fixed for completion, and did not keep it ready making no interest of it; and it was held by Romer J. that there had been no undue delay on the part of the vendor, nor any "default" on his part within the meaning of the clause, and that the vendor was entitled to interest.

The purchaser appealed.

Neville, Q.C., and *J. W. M. Holmes*, for the appellant, made use of the arguments already reported, and the only additional authorities referred to were *Williams* v. *Glenton* (3) and *In re Wilsons and Stevens' Contract.* (4)

Farwell, Q.C., and *Cave*, for the respondent, were not called upon.

Lindley M.R. I do not think we need trouble you, Mr. Farwell.

It appears to me that in this case the key to the whole situation is this: that there was no want of reasonable care on the part of the vendor in not discovering and not providing for the blot which was discovered by the extreme vigilance of the purchaser's professional advisers. If Mr. Neville was right in

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(1) 31 Ch. D. 168.
(2) [1893] 3 Ch. 269.
(3) (1866) L. R. 1 Ch. 200.
(4) [1894] 3 Ch. 546.

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maintaining that every omission by a vendor to detect and provide for any blot on his title involved default, of course in that case there would be a default. But when we regard the history of these clauses, and the mode in which they have been construed now for many years, I do not think that that extreme proposition can be maintained.

It is known perfectly well that the clause which obliges a purchaser to pay interest, if from any cause whatever the purchaser does not complete on a particular day, is put in mainly for the purpose of giving the vendor some hold on the purchaser. In the absence of some provision of that kind the purchaser might dawdle on for ever, unless the vendor chose to bring an action to complete.

It is one of the necessary precautions. Of course it is a clause which is liable to abuse, because the vendor knows, and the purchaser does not know, the state of the vendor's title. The vendor knows whether he is fixing a day for completion which is a reasonable time, having regard to the difficulties which he knows he has to deal with, and if there were not some limit put on these clauses, either by construction or by the wording of them, to prevent vendors taking advantage of their own wrong, these clauses would be very oppressive. But now, partly by construction and partly by the mode in which they are framed by conveyancers, that injustice is generally, indeed almost always, avoided. It is very seldom that a vendor can take advantage of his own wrong and compel a purchaser to pay interest under stress of the words "if from any cause" if the vendor is himself to blame.

We have got a case here of a somewhat unusual character. For myself I am bound to say I do not think that the purchaser would have suffered to the extent of one farthing in money, or any degree of risk, if he had not insisted upon this supplemental confirmation of the deed. He would have got a title which was open to the technical objection taken to it by the vigilance of his professional adviser. But what would he have got if he had not insisted upon that supplemental deed? He would have got from the trustees the legal estate—that is obvious—and he would have got that legal estate conveyed with the consent of the three managing directors of the Standard Society. He would not have got—nor was it necessary that he should get—a conveyance under the seal of the society, because, as I understand from the recitals of the Act of Parliament, this society was not an incorporated society. It was a society empowered to sue and to be sued. It was one of the old-fashioned societies. Therefore, in order to invalidate his title, some steps would have to be taken by the insurance society to impeach the sale although the trustees had conveyed the property, and had received the purchase-money, and the society's ground of complaint would be that there was some omission to sanction this transaction by a resolution of the whole of the directors. I will not say that it is not a blot. It is when it is pointed out, and I think it is very creditable to the adviser of the purchaser that he should have detected it, so that as a matter of precaution it should be put straight. But it does seem to me to be nothing more than an extraordinary precaution; and in my opinion it would be going a great deal too far to say that the omission to discover and provide for the removal of every defect in title not known or suspected, but only discoverable by extraordinary vigilance, is a default within the meaning of these clauses.

That appears to me to be the true solution of this difficulty.

The result is that in my opinion the appeal ought to be dismissed with costs.

CHITTY L.J. I am of the same opinion, and have very few words to add. The question raised is as to the meaning of the word "default" in this 10th clause, the contract being one of sale and purchase of real estate. The term "default" is not here to be interpreted as it would be in an ordinary case of sale of goods, or a simple contract of that kind. Contracts of sale of real estate have always been put in courts of equity, and in courts of law also, upon a special footing of their own.

As regards damages, the purchaser is not able to recover damages in an ordinary case and in ordinary circumstances for the loss of his bargain. I merely mention these points for the purpose of meeting Mr. Neville's argument, the substance of which was that the default was equivalent in this case to mere failure to perform—that is to say, mere failure to convey on the day, arising from a defect in title; that, he says, is sufficient to excuse the purchaser from payment of the interest.

Now, in my opinion, we have got here a case by no means difficult to deal with. I quite agree with what the Master of the Rolls has said—that when the title is very carefully examined and great vigilance brought to bear upon the subject-matter, there was something which shewed that the title might have been said to be defective. I do not think it amounts to more than that. The legal estate had been conveyed by the trustees of the insurance office; the money had reached the coffers of the insurance office itself; three of the directors joined in the conveyance; and the objection really resolves itself into neither more nor less than this—that this slight defect had not been noticed. It is not a case of the vendor selling with a defect known to or suspected by him. He had no reason to believe there was any defect of title, and no reason to suspect it. The result is that the purchase would have been completed but for the discovery of this slight defect. The presumption is that he had taken advice on the subject, and there was no want, in my opinion, of reasonable care on the part of the vendor or his advisers in not having found out this defect—if defect it be—in fact, it required a high degree of vigilance or caution to discover it. In my opinion, these circumstances are not sufficient to establish a case of default on the part of the vendor.

For these reasons I concur in the judgment that the Master of the Rolls has delivered.

COLLINS L.J. I am of the same opinion. I think that when Mr. Neville was constrained to admit, as he did admit, that the definition of "default" given by Bowen L.J. in *In re Young and Harston's Contract* (1) applied, there was an end of this case. That definition is this. The Lord Justice says, speaking of "default": "It means nothing more, nothing less, than not doing what is reasonable under the circumstances—

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(1) 31 Ch. D. 174.

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Collins L.J.

not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction." Mr. Neville's point was that if there was any blot on the title that in itself was a default; and in a sense, if you were dealing with an absolute sale of goods, that might very well be a default. It would be a failure on the part of the vendor to perform what he had undertaken to perform. But when you are dealing with a contract for the sale of land, a long series of decisions has established that you ought not to try the obligation of the vendor by the standard applied by the common law in cases of ordinary sales of chattels. And, further, when you come to look at the process by which these words "default" and "wilful default" got into these contracts, it is clear that, in cases dealing with the sale and purchase of real property, "default" is not used, and cannot be used, in the sense of mere failure to perform.

That process is clearly stated in the judgment of Turner L.J. in *Williams* v. *Glenton*. (1) In that case the words were the general words—"if from any cause whatever" the purchase should not be completed on the day fixed by the contract, the purchaser should nevertheless pay interest from that day until completion; and Turner L.J. says (2): "The case attempted to be made on the part of the purchaser is, that there has been so much delay on the part of the vendor as to amount to a wilful default or neglect on his part, which, according to the cases, would suffice to absolve the purchaser from the liability to interest even under the terms of such a contract as the present." The cases he refers to really rested on the principle that a person cannot take advantage of his own wrong, wrong in such connection not necessarily involving the breach of a moral obligation, but at all events embracing something more than mere failure such as the conscious abstention from doing what it was reasonable to do. In this case, when you come to consider the particular flaw, it seems clear to me that no amount of ordinary and reasonable care on the part of the vendor would have enabled him to discover it; there was no abstention on his part from doing that which he reasonably ought to have

(1) L. R. 1 Ch. 200.

(2) L. R. 1 Ch. 210.

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done; and, therefore, the fact that he did not discover it, to my mind, falls very short of establishing anything like default in the ordinary sense of the word as applied to the sale of real property.

Lindley M.R. The appeal will be dismissed with costs.

Solicitors: *Ingle, Holmes & Sons; Hulberts, Hussey & Metcalfe.*

W. W. K.

C. A.
1898
July 4.

In re WHITE.
PENNELL *v.* FRANKLIN.

[1891 W. 631.]

Will—Solicitor-Executor—Trustee—Profit Costs—Power to Charge—"Legacy"—Insolvent Estate.

Applied. Dale v. Inland Rev. Commrs. [1952] 1 Ch. 704

A solicitor who is the sole executor and trustee of a will is not entitled to his profit costs of acting as solicitor to the estate if it turns out to be insolvent, even though the will contains a clause declaring that he should be the solicitor to the estate, and should be allowed to charge for work done as such solicitor; for the clause is in effect a legacy of profit costs to the solicitor, and being bounty he cannot claim it as against creditors.

The rule applies to all professional trustees.

The decision of Kekewich J., [1898] 1 Ch. 297, affirmed.

This was an appeal from a decision of Kekewich J.—see [1898] 1 Ch. 297—where the facts and arguments are fully reported.

It will be sufficient for the purposes of this report to state shortly that the appellant S. Franklin is a solicitor, who is the sole executor and trustee of a will containing a declaration by the testator that the appellant was to be the solicitor to the estate, and as such, notwithstanding his acceptance of the trusteeship and executorship of the will, should be allowed all professional and other charges for his time and trouble, which, if employed as solicitor to the trustees and executors, not being himself a trustee and executor, he would be entitled to make.

The will appointed two other persons besides Franklin executors and trustees, but they disclaimed, and Franklin alone proved the will. The estate was insolvent, and Kekewich J. held that, having regard to that circumstance, Franklin was not entitled to certain profit costs claimed by him under the declaration in the will in respect of work done as solicitor to the estate.

Mr. Franklin now appealed.

Cozens-Hardy, Q.C., and *J. G. Wood*, for the appellant, made use of the arguments and cited the authorities already reported in the Court below.

Farwell, Q.C., and *Church*, for the respondent, were not called upon to argue.

Lindley M.R. I do not think it is possible for us to differ judicially from the decision of the learned judge in the Court below. This is a creditor's action. The defendant, Franklin, is a trustee who happens to be a solicitor, and happens to be the only trustee and the only executor of the testator. The two other executors and trustees disclaimed, and must, therefore, be disregarded. It is impossible to get over the authorities and the principles on which they are based. The estate is insolvent, and the solicitor is seeking to charge profit costs, upon the ground that the will of the testator contains a clause enabling him to do so.

Kekewich J. has declared in the order appealed from that, having regard to the insolvency of the estate, the defendant is not entitled to any profit costs, notwithstanding the declaration contained in the testator's will. Looking at the decisions, I do not see how we can come to any other conclusion, and the appeal must be dismissed with costs.

Chitty L.J. I am of the same opinion. I see no escape from the proposition of law laid down by Kekewich J. The law is that, in the absence of a direction to the contrary, a trustee must give his services gratuitously. The declaration made by the testator is bounty on his part. No one can claim

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the bounty until the creditors are satisfied. The principle applies not only to solicitor-trustees, but to all trustees, to accountant-trustees, to architect-trustees, and surveyor-trustees; in fact, to all professional trustees.

COLLINS L.J. I am of the same opinion.

Solicitors: *S. Franklin; Maitlands, Peckham & Co.*

W. W. K.

STIRLING J.

1898

April 26, 27; May 7.

In re HADEN.

COLING *v.* HADEN.

[1896 H. 1170.]

Husband and Wife—Marriage Settlement—Covenant by Husband alone that After-acquired Property of Wife shall be settled.

A marriage settlement contained a covenant by the husband alone that all the real and personal estate above a certain value which should at any time during the coverture by any means be acquired by the wife or the husband in her right should forthwith be settled upon the trusts of the settlement. The wife was a party to and executed the deed. During the coverture she became entitled under the will of her father to certain real estate:—

Held, that the property in question was bound by the covenant.

ADJOURNED SUMMONS.

By an indenture dated July 31, 1850, made upon the marriage of William Henry Haden and Jane Coling, and duly executed by both of them, certain property was assigned to trustees upon trust for the benefit of the husband and wife and the issue of the marriage, and the settlement contained a covenant by the said W. H. Haden with the trustees "that all the real and personal estate which shall at any time or times by any means be acquired by the said Jane Coling or the said William Henry Haden in her right to the value at any one time of fifty pounds shall at the cost of the trust funds be forthwith settled upon trusts as nearly according with the trusts above declared concerning the trust funds hereby assigned as may be."

Mrs. Haden died on July 22, 1881.

This was a summons taken out by the plaintiffs, a beneficiary under the settlement and his mortgagee, raising the question whether certain real estate, to which Mrs. Haden during her coverture became entitled under the will of her father, was bound by the covenant and subject to the trusts of the settlement.

Ingpen, for the summons. I submit that this covenant to settle after-acquired property is binding on the wife. The decisions upon covenants of this kind have turned upon very fine distinctions. In *Young* v. *Smith* (1) the wife was held not bound; but there the covenant was that the husband would settle the property, and here it is that the property shall be settled. In *Lee* v. *Lee* (2) Sir George Jessel came to a different conclusion upon a very similar covenant, and relied strongly upon the fact that the wife was an assenting party to the settlement. Again, in *In re De Ros' Trust* (3) Kay J. held that the wife was bound by a covenant by the husband that he and the wife would settle the wife's after-acquired property, she having executed the settlement.

This case falls within the principle of the two latter cases.

George Lawrence, for a defendant in the same interest. The wife is bound by the husband's covenant: *Lee* v. *Lee* (2) and *Dawes* v. *Tredwell.* (4)

O. L. Clare, for the representative of the last surviving trustee of the settlement.

Cunliffe, for the representatives of the heir-at-law of Mrs. Haden. There is nothing in the settlement to shew any agreement on the part of the wife to settle her after-acquired property, and she is not bound by the husband's covenant: *Ramsden* v. *Smith.* (5)

The word "settled" does not mean settled by all proper parties. If it did, then, no doubt, according to *Butcher* v. *Butcher* (6), the wife would be bound.

In *Lee* v. *Lee* (2) the property covenanted to be settled was the specific property of the wife. In *In re De Ros' Trust* (3) there was an ambiguity, and the Court was able to look at the recitals of the deed; but here there are no recitals.

Ingpen, in reply. The principle is laid down by the Master of the Rolls in *Lee* v. *Lee.* (2)

[STIRLING J. Ought the husband to be assumed to covenant with respect to property which he has no right to convey? It is a very strong thing to hold that the wife is bound by the covenant merely because she has executed the settlement.]

(1) (1865) L. R. 1 Eq. 180.
(2) (1876) 4 Ch. D. 175.
(3) (1885) 31 Ch. D. 81.
(4) (1881) 18 Ch. D. 354.
(5) (1854) 2 Drew. 298.
(6) (1851) 14 Beav. 222.

The wife assented to the deed, and the question is whether there is within the deed a sufficient contract to bind her. The meaning of the covenant is clear: it means that the after-acquired property shall be settled by all proper parties; and the property in question is bound.

Cur. adv. vult.

May 7. STIRLING J. (after stating the facts). Similar covenants have been frequently the subject of decision. On the one hand, in the case of *Butcher* v. *Butcher* (1), where the form of the covenant was, that in case any personal estate should at any time thereafter during the coverture come to or vest in the wife or in the husband in his right, the same should be "paid assigned or transferred by all proper parties," it was held that a reversionary interest in certain property to which the wife became entitled during the coverture for her separate use was bound by the covenant. On the other hand, in *Dawes* v. *Tredwell* (2), where the words were very similar, except that the settlement was not to be "by all proper parties," but the acts were only to be done by the husband, it was held that property which came to the wife for her separate use was not bound by the covenant. But the cases most nearly resembling the present are two. The first is *Lee* v. *Lee* (3), a decision of Sir G. Jessel, where, by an ante-nuptial agreement signed by all the parties thereto, including the intended wife, the parents of the wife agreed with the husband that they would appoint to their daughter a reversionary share of certain property comprised in their own marriage settlement, and the husband agreed that he would settle such share as his wife might take in the property either by appointment or in default of appointment. It was held by the Master of the Rolls that, although there was no express covenant by the wife, nevertheless the property was bound. The Master of the Rolls said (4): "Then the husband proceeds to settle, or agrees to settle, what does not belong to him, as indeed appears by the instrument itself. Unquestionably, the property was not his to settle; it was his wife's, and he could not settle it himself, because during the lives of the wife's father and mother he could have no interest whatever, therefore his covenant or agreement to settle was a covenant or agreement to settle not his own estate but somebody else's. But the wife was an assenting party to this agreement. It was, therefore, simply an agreement by A., with B.'s assent, to settle B.'s estate, and in such a case it is clear that B. is bound. So that even if it is treated as a covenant by the husband alone, yet it is for valuable consideration, and with the assent of the wife, and she is therefore bound." That was a case in which the property the subject of the agreement was specific and was the property of the wife. But in the case of *In re De Ros' Trust* (1) Kay J. applied the same doctrine to a covenant which did not relate to specific property of the wife, but was expressed in general terms. The difference between that case and this is, that although the covenant was on the part of the husband alone, yet the acts which were to be done in pursuance of the covenant were expressly to be done by the wife as well as the husband. The covenant was as follows: [His Lordship read it, and continued:—] Then there was an agreement that until the execution of the settlement the husband and wife would stand possessed of the property upon the trusts of the settlement. Kay J. said this (2): "In *Lee* v. *Lee* (3), by an ante-nuptial agreement, Arthur Lee agreed that he would settle such share as his wife might take in certain property, either by appointment, or in default of appointment, in a particular way, and that agreement was signed by all parties including the wife. This settlement which I have before me is executed by the wife. She is a party to an instrument upon the face of which I can read, as it seems to me, an agreement that she will execute whatever deed may be necessary in order to assign this property to the trustees on the trusts of the settlement. Now, why should not that be binding upon her? I confess I do not see, and it seems to me that it is. It is very plain law that if you can find that which amounts to an agreement within the four corners of a deed, it is as binding as a covenant

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(1) 14 Beav. 222.

(2) 18 Ch. D. 354.

(3) 4 Ch. D. 175.

(4) Ibid. 179.

(1) 31 Ch. D. 81.

(2) 31 Ch. D. 88.

(3) 4 Ch. D. 175.

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HADEN, *In re.* COLING *v.* HADEN.

expressed in the most apt possible words. There may have been a defect of expression in the mode in which this covenant is worded. No doubt it would have been more proper, according to the view which I take, that the wife should in terms have joined in the covenant. But she has executed a deed which contains a covenant by the intended husband that she is to be a party to the conveyance actually to be made, and if the case rested only on that, it seems to me that she ought to be held to be bound."

In the present case the covenant is by the husband alone that the property shall be settled, not saying by whom. The wife was a party to and executed the settlement. It contains no recitals; so I can gain no assistance from that source. It seems to me, I confess with some hesitation, that the only way in which I can deal with such a covenant is to look and see if it has a plain meaning, and if so to give effect to it. Looking at it from that point of view and reading the material words, it is a covenant that all the real and personal estate which shall at any time be acquired by the wife or the husband in her right shall be settled. Can I fairly limit the subject-matter of the covenant to the interest of the husband in the real estate? It seems to me that I cannot. The words are in my opinion intended to include more than the mere interest of the husband. It is an agreement that all the real property of the wife shall be settled, and a person assenting to such a covenant must be taken to mean that the covenant shall take effect accordingly. I hold that the property in this case is bound by the settlement.

Solicitors: *George Brown, Son & Vardy; Geare, Son & Pease, for Tucker, Forward & Son, Chard; Cunliffes & Davenport; Rowcliffes, Rawle & Co., for Slatter, Son & Gibbs, Stratford-on-Avon.*

G. A. S.

STIRLING J.
1898
April 26; May 24.

In re PRINCE.
GODWIN *v.* PRINCE.

[1898 P. 78.]

Testamentary Expenses—Probate Costs—Costs of unsuccessfully opposing Probate.

The plaintiff's costs of an unsuccessful action impeaching the validity of a will, though ordered by the judge of the Probate Division to be paid out of the testator's estate, are not testamentary expenses.

THIS was a summons taken out by the executors of the will of John Prince, deceased, for directions whether, the personal estate of the testator being insufficient for the payment of his debts, the plaintiffs might be at liberty to raise by mortgage or sale of the testator's real estate a sum sufficient to pay the costs of all parties to an action of *Prince* v. *Godwin*, lately pending in the Probate Division, directed to be paid out of the testator's estate by an order of the Probate Division.

The testator made his will on April 1, 1895, and thereby devised and bequeathed the residue of his real estate and the residue of his personal estate, subject to the payment of his just debts and funeral and testamentary expenses, to his children; and he authorized and empowered his executors to raise by mortgage of his real estate any sum which might be necessary for the purposes of his estate and for the payment of the legacies.

The testator died on May 29, 1896; and on November 19, 1896, his will was proved in common form by the executors. On January 13, 1897, the testator's widow commenced an action in the Probate Division impeaching the validity of the will. By her statement of claim she alleged that the will was not duly executed, and that the deceased, at the time when the will purported to be executed, did not approve the contents, and was not of sound memory and understanding; and she claimed that the Court should revoke the grant of probate of that will, and should decree probate of a previous will dated June 10, 1891. The defendants, the executors, denied these allegations, and claimed that the Court should pronounce against the will set up by the plaintiff, and decree probate in solemn form of the will of 1895. The case was heard on November 19, 20, and 22, and, in the result, the judge pronounced in favour of the will of 1895, and ordered the costs of both parties to be paid out of the testator's estate.

The testator's personal estate being insufficient for the payment of the costs of the executors, the question arose whether the costs of the widow as well as the remaining costs of the executors were payable out of the real estate.

Romer, for the summons.

Martelli, for residuary devisees. Apart from the Land Transfer Act, 1897, which does not apply to this case, the Probate Division has no jurisdiction to order costs to be paid out of the testator's real estate: *Young* v. *Dendy* (1); *Charter* v. *Charter* (2); *In re Price* (3); *In re Shaw* (4); Williams on Executors, 9th ed. p. 311, note (u).

E. P. Hewitt, for the widow. I do not contend that the Probate Division has jurisdiction to order costs out of the real estate, but I submit that these costs are payable out of the real estate because they are testamentary expenses which by this will are charged upon the real estate. In none of the cases cited was there any charge of testamentary expenses on real estate except in *In re Price.* (3) In that case the admission of counsel that the costs of an unsuccessful opposition to probate (though ordered by the Probate Court to be paid out of the estate) were not payable out of the real estate was confined to the specifically devised real estate, and did not apply to the proceeds of the residuary real estate upon which, together with the residuary personal estate, the testamentary expenses were charged, and the point was not there decided.

In *Brown* v. *Burdett* (5), where testamentary expenses were charged on the real estate and probate of the will was opposed, but the opposition was withdrawn upon the terms that the costs of the opponents should be paid out of the estate in accordance

(1) (1867) L. R. 1 P. & M. 344.
(2) (1876) 3 Ch. D. 218.
(3) (1886) 31 Ch. D. 485.
(4) [1894] 3 Ch. 615.
(5) (1883) 31 W. R. 854.

with the practice of the Probate Court, such costs were held, upon a summons taken out in an action for the administration of the estate of the deceased, to be testamentary expenses and payable out of the real estate.

Martelli, in reply. The costs of a person who brings an action in the Probate Division to impeach the validity of a will and fails are not testamentary expenses. *Brown* v. *Burdett* (1) is distinguishable because there the will was established under a compromise which was for the benefit of all parties. I rely upon *In re Price.* (2)

[STIRLING J. That case does not appear to decide the question one way or the other. Pearson J. was there proceeding on the view that the residuary fund was not sufficient to pay the costs of the administration action, which, according to *In re Mayhew* (3), take priority over the costs of the Probate action.]

But *In re Mayhew* (3) went upon the footing that such costs were not testamentary expenses, because if they were testamentary expenses they would come before the costs of the administration action. Further, we are devisees of the real estate, and the probate is not necessary to our title. The term "testamentary expenses" means expenses incident to the proper performance of the duty of an executor—*Sharp* v. *Lush* (4)—and does not include the expenses of administering the real estate: *Patching* v. *Barnett* (5); Williams on Executors, 9th ed. p. 851.

[He also contended upon the construction of the will that the testamentary expenses were charged upon the personal estate only; but the Court declined to adopt that construction.]

Cur. adv. vult.

May 24. STIRLING J. The question which arises on this summons is as to the payment out of the testator's real estate of the costs of the plaintiff in the Probate action. [His Lordship stated the facts, and continued:—]

It was admitted upon the argument before me, and according

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(1) 31 W. R. 854.
(2) 31 Ch. D. 485.
(3) (1877) 5 Ch. D. 596.
(4) (1879) 10 Ch. D. 468.
(5) (1881) 45 L. T. 292.

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to the authorities it is quite clear, that the order of the Probate Division of November 22, 1897, affected only the personal estate of the testator. It will hereafter have to be borne in mind that the Land Transfer Act, which came into operation on January 1 of the present year, has made an alteration in that respect, and that the Probate Division, as I understand, has now jurisdiction to deal with the realty as well as the personalty. However, that is not the point which arises in this case. [His Lordship referred to the will, and continued :—] The question is whether the costs of the plaintiff in the probate action can be paid out of the real estate as testamentary expenses. Now, this Court has certainly not drawn a very narrow line as regards the meaning of "testamentary expenses," and I have no wish to do anything to narrow the definition which that expression has received in this Court. It has been held that where an action has been properly brought by an executor or administrator for the administration of the personal estate, and the proper parties appear, the costs of both plaintiff and defendants are as a general rule testamentary expenses within the meaning of such a will as this. Moreover, it is not necessary that the action should have been brought by the executor. The same rule applies if one of the persons beneficially entitled comes here as plaintiff and asks the Court that directions may be given to the executors for the proper administration of the estate. Although I have not been referred to any case which defines the meaning of "testamentary expenses" as regards an action in the Probate Court, I should be sorry to lay down any very narrow definition with regard to it. For example, if there were an action properly brought by the executors for probate of the will in solemn form in which it was necessary to summon various parties who might be interested in disputing the validity of the will, and if those parties appeared and contented themselves with simply cross-examining the plaintiff's witnesses, or with producing such further evidence as might in the judgment of the Court be necessary in order to enable the Court to arrive at a proper determination whether the will ought to be proved or not, I should be unwilling to say, if the Court of Probate said that these were proper costs to be paid out of

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the personal estate, that they were not, or might not be, also testamentary expenses within the meaning of such a will as this. Again, even if the proceedings were not taken by the executors, but by some other person interested in upholding the will, and that was considered by the Court of Probate to be a reasonable course to take for establishing the will, I should be unwilling to hold, simply on the ground that the action had not been brought by the executors, that the plaintiff would be excluded from the benefit of a disposition in the will charging testamentary expenses upon the real estate. But here the plaintiff in the probate action comes challenging the will. It is not a mere mode of getting the decision of the Court upon the validity of the will by requiring the will to be proved in solemn form, but, as I have ascertained from the learned judge who tried the case, there was a serious contest raised by this lady as to the validity of the will. That the costs of the executors in the probate action were testamentary expenses appears to me to be beyond controversy: they are costs properly incurred in upholding the will. The costs of the plaintiff, on the other hand, or the bulk of them—and they are very considerable—were incurred in contesting the will—in asserting that it was a will which ought not to be recognised as the will of the testator; and it does not appear to me, however wide the definition may be, that those costs ought to be regarded as testamentary expenses.

Solicitors: *Morten, Cutler & Co., for Challinors & Shaw, Leek; Preston, Stow & Preston, for Tomkins, Leek.*

H. B. H.

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June 15, 16.

LIFE INTEREST AND REVERSIONARY SECURITIES CORPORATION *v.* HAND-IN-HAND FIRE AND LIFE INSURANCE SOCIETY.

[1897 L. 263.]

Vendor and Purchaser—Title—Specific Performance—Mortgagee Vendor—Statutory Power of Sale—Defective Exercise—Conveyancing and Law of Property Act, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 19, *sub-s.* 1 (*i.*) *; ss.* 20, 21, *sub-s.* 2.

The provision in sub-s. 2 of s. 21 of the Conveyancing and Law of Property Act, 1881, that where a conveyance is made in professed exercise of the power of sale conferred on mortgagees by the Act, the title of the purchaser shall not be impeached on the ground that the power was improperly exercised, does not apply until the conveyance has been obtained; consequently, it does not preclude a person who has contracted to purchase from a mortgagee purporting to sell under his statutory power of sale from inquiring whether the vendor was in a position to exercise the power, nor from proving aliunde, in answer to an action for specific performance, that the power was improperly exercised.

Dicker v. *Angerstein*, (1876) 3 Ch. D. 600, explained and distinguished.

THIS was a vendors' action for specific performance of an agreement to purchase a reversionary interest in a sum of 2000*l.* The contract was entered into on December 17, 1896, on a sale by auction, and the day fixed for completion was January 25, 1897. The conditions of sale contained the usual provision that all objections and requisitions, if any, in respect of evidence of title, &c., should be sent to the office of the vendors' solicitor within ten days of the delivery of the abstract, and that all objections and requisitions not delivered within that time should be deemed to be waived. The title of the vendors was derived under a mortgage dated April 22, 1896, granted by H. C. Simonsen to J. B. Chapman, which mortgage was, on October 23, 1896, transferred by Chapman to the vendors.

The mortgage of April 22, 1896, was inartificially framed and gave rise to the controversy which led to this action. The mortgage was to secure an advance of 150*l.*, and by it the mortgagor covenanted to pay to the mortgagee on June 19 then next the said sum of 150*l.*; and, further, that if the said sum of 150*l.* were not paid on that day, then to pay interest thereon at the rate of 20 per cent. per annum, calculated as commencing from the said June 19 then next, so long as the principal money should remain due, by equal quarterly instalments on the usual quarter-days. Then followed an assignment of the mortgaged premises, subject to a proviso for redemption on payment of the said sum of 150*l.* on or before the said June 19 then next, or, if after the said June 19, then with interest thereon according to the foregoing covenant in that behalf from the said April 19 (*sic*) next. And the deed contained the following power of sale: "Provided always and it is hereby agreed and declared that the power of sale conferred on mortgagees by the Conveyancing and Law of Property Act, 1881, shall apply to this security so as to be immediately exercisable on default by the mortgagor in the payment of the principal moneys or interest hereby secured at any time after the said 19th day of April (*sic*) next without the restrictions in the said Act contained as to giving notice or otherwise without any further consent on the part of the mortgagor or any other person or persons." Upon delivery of the abstract of title the purchasers raised the objection that the power of sale contained in this deed was not exercisable till April 19, 1897. To this the vendors replied that April 19 was a clerical error for June 19, and offered to indemnify the purchasers from all liability on this head should any question arise. The purchasers declined to take a title on that footing; and on February 4, 1897, the vendors commenced the present action for specific performance. The defendants by their defence (paragraph 4) denied that the plaintiffs were, on January 25, 1897, the day fixed for completion, or at any time previously, or at the date of the defence, entitled to sell the mortgaged premises; and they counterclaimed for a return of the deposit paid by them at the date of the contract. At the trial of the action it was contended for the first time on behalf of the plaintiffs that, assuming the construction contended for by them to be wrong, and that the power contained in the mortgage was capable of being read as it stood, the statutory power conferred by the Conveyancing and Law of Property Act, 1881, applied between June 19, 1896, and April 19, 1897, and it was sought to make a good title under this statutory power. The plaintiffs called no evidence in support of their case. The defendants contended that, assuming the statutory power to exist, which they disputed, the power was not exercisable, because no notice as required by s. 20 of the Conveyancing and Law of Property Act, 1881, had been served on the mortgagor requiring payment of the mortgage money. They did not call any evidence of their own, but they called Mr. Chapman, who was the managing clerk of the plaintiffs' solicitor and the original mortgagee, and asked him the question, "Did you give notice to the mortgagor requiring payment of the mortgage money due under the deed of April 22, 1896?" This question was objected to.

Jenkins, Q.C., and *Ribton*, for the plaintiffs. We object to the question as irrelevant. Having regard to the terms of the Conveyancing Act, 1881 (1), a purchaser from a mortgagee selling under his statutory power is not entitled to inquire whether notice demanding payment of the mortgage money has been given unless he either knows or must be taken to have known that no such notice has been given—*Selwyn* v. *Garfit* (1)—because the Act gives ample protection to a bonâ fide purchaser. See *Dicker* v. *Angerstein* (2), which was a decision upon an express power framed in very similar terms to the statutory power. Nor can such purchaser shew aliunde that notice has not in fact been given, for he cannot be allowed to ask a question to destroy the equitable title which the Act confers upon him.

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(1) The material provisions of the Conveyancing and Law of Property Act, 1881, are as follows:—

"19 (1). A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):—

"(i.) A power, when the mortgage money has become due, to sell . . . . the mortgaged property. . . ."

"20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

"(i.) Notice requiring payment . . . . has been served on the mortgagor, ... and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

"(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

"(iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor . . . . to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon."

"21 (2). Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power."

The issue in this action is whether upon the day fixed for completion the vendors could make a good title to the purchasers according to the contract, and to enable the purchasers to succeed in their defence it is necessary to prove two things—one, that the vendors were not then in a position to exercise their power; two, that the purchasers knew it. The mere defect in the exercise of the power is not material until it is proved that the purchasers had notice of it; and they cannot now call evidence for the purpose of acquiring that notice. Even if the purchasers could have made requisitions as to the notice requiring payment—which we deny—it is now too late to raise the objection.

[They also referred to *Upperton* v. *Nickolson* (3); *In re Scott and Alvarez's Contract.* (4)]

Butcher, Q.C., and *P. M. Walters*, for the defendants, were not called upon except upon the question whether, having regard to the fact that they had not made any requisitions addressed to this point, they were not now precluded from giving evidence upon it.

In resisting an action for specific performance, a purchaser is not precluded by conditions of sale in the form in this case from proving by any means in his power that the vendor's title is defective, though he may be precluded from obtaining a return of the deposit: *In re National Provincial Bank of England and Marsh.* (5)

[They were stopped.]

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(1) (1888) 38 Ch. D. 273.

(2) 3 Ch. D. 600.

(3) (1871) L. R. 6 Ch. 436.

(4) [1895] 1 Ch. 596; 2 Ch. 603.

(5) [1895] 1 Ch. 190.

STIRLING J. I am asked upon a formal objection as to admissibility of evidence to decide a somewhat important practical question of law. The question arises in this way. An action is brought by the vendors for specific performance of an agreement for the sale of a reversionary interest. The vendors claim to be mortgagees of one Simonsen under a mortgage dated April 22, 1896. The date fixed for the completion of the contract is January 25, 1897. A defence is put in, and by paragraph 4 the defendants deny that the plaintiffs were on January 25, 1897, or at any time previously to that date, or that they are now entitled to sell the mortgaged premises comprised in the indenture of April 22, 1896. Upon the abstract being delivered, the objection was raised that the power of sale which is expressly contained in the mortgage deed was not applicable. I will assume, though I have not yet decided, that that objection is well founded. The purchasers insisted on that objection; consequently this action was brought, and the defendants put in the defence I have mentioned, and counter-claimed for the return of the deposit. At the trial it was suggested for the first time that a title could be made otherwise than under the express power contained in the mortgage deed of April 22, 1896. That deed provided that the power of sale conferred on mortgagees by the Conveyancing and Law of Property Act, 1881, should be immediately exercisable on default by the mortgagor in the payment of the principal moneys or interest thereby secured at any time after the said April 19—i.e. April 19, 1897—without the restrictions in the said Act contained as to giving notice or otherwise. Consequently, upon the deed as it stands, the power of sale did not arise till a date subsequent to the day fixed for the completion of the purchase. But it is said that there is another power of sale arising under the Conveyancing Act not in the manner provided by the deed—that is to say, free from the restrictions contained in the Act—but subject to the restrictions and the fulfilment of the requirements in the Act. The case stands in this way. The plaintiffs open their case and take their stand on their deeds and documents, as they are entitled to do. The defendants do not put in any evidence of their own, but call Mr. Chapman, the managing clerk of the plaintiffs' solicitor, and also himself the original mortgagee under the deed of April 22, 1896, and he is asked this question: Did you give any notice to the mortgagor demanding payment under the mortgage? The object of that is to prove the issue raised by the defence that the plaintiffs were not entitled to sell. The plaintiffs' answer to that issue is two-fold—first, that there was a title to sell; secondly, that, having regard to the conditions of sale, the purchasers were too late to raise any such objection, and that a good title is shewn according to the contract.

The first point, namely, that there was a title to sell, is one of considerable importance, and turns upon the provisions of the Conveyancing and Law of Property Act, 1881, ss. 19, 20, and 21. [His Lordship read s. 19, sub-s. 1 (i.), and s. 20.] Apart from the provisions of s. 21, which I have still to consider, I apprehend that the power of sale conferred by the statute would not be exercisable by the mortgagee except on the happening of one of the events mentioned in s. 20. The object of the purchasers in putting the question which has been objected to is to shew that none of these events has occurred, and that consequently the vendors have no title to sell. If the case stood upon s. 20 alone, I should hold that the purchasers were right in that view, and that they could not be compelled to take a title unless the vendors satisfied them that one or other of the events therein mentioned had occurred; but reliance is placed by the vendors upon s. 21, sub-s. 2. That provision must be carefully considered. [His Lordship read the subsection, and continued:—]

The way in which the objection to the question is put is this. It is said that it is irrelevant on the ground that, having regard to this provision, the vendors can make a good title to a purchaser who has no notice that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised—that in point of fact the Act confers on the mortgagee a power to sell to a purchaser of that description—that is to say, a bonâ fide purchaser without notice—and that the remedy of any person damnified by an unauthorized or improper or irregular exercise of the power is in damages only. That view of a power of sale was taken by Sir George Jessel M.R. in *Dicker* v. *Angerstein.* (1) That was a case of an express power contained in the mortgage deed, and the power was of a much wider nature than that which is conferred by the Conveyancing Act, 1881. The mortgage deed, after conferring on the mortgagee, Tidy, a power of sale if default should be made in payment of the principal money and interest at the date therein mentioned, provided that the power should not be exercised unless default should have been made in payment of the principal money thereby secured, or the interest thereon should have been in arrear for more than three months. Then followed this further proviso: "That, upon any sale purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers shall not be bound to see and inquire whether either of the cases mentioned in the clause or provision lastly hereinbefore contained has happened, or as to the necessity or expediency of the stipulations subject to which such sale shall have been made, or otherwise as to the propriety or expediency of such sale, and, notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, so far as regards the safety and protection of the purchaser or purchasers, be deemed to be within the aforesaid power in that behalf, and to be valid and effectual accordingly; and the remedy of the said W. J. N. Angerstein," the mortgagor, "his heirs or assigns, in respect of any breach of the clause or provision lastly hereinbefore contained, or of any impropriety or irregularity whatsoever in any sale, shall be in damages only." Observe the language of this proviso. First of all it applies to any sale (not conveyance) purporting to be made in pursuance of the power in that behalf; secondly, the purchaser on such sale is not bound to see or inquire whether either of the cases mentioned in the preceding clause has happened; thirdly, notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, so far as regards the protection of the purchaser, be deemed to be within the power; and, lastly, the remedy of the mortgagor is to be in damages only. In that case the question arose, not between the vendor and the purchaser, but between the purchaser and the mortgagor, or his assign; and the decision of the Master of the Rolls was that the purchaser had a good title, even though the whole of the mortgage debt had been paid off at the time of the purchase. The Master of the Rolls deals with the case thus. He says (1): "It appears to me that this is put in about as plain language as you can put it, that the right to sell shall be so absolutely vested in Tidy as to give a good title to the purchaser, that is, to a bonâ fide purchaser, which this gentleman is, notwithstanding that the power of sale is not really exercisable; if it purports to be in exercise of the power, which this sale was, it is to be deemed within the power, which means that the remedy of Angerstein is against Tidy in damages, which is supposed to be a sufficient protection to the mortgagor; and no doubt, in the case of a solvent mortgagee, it is a very efficient protection. But, then, it is said it does not apply to the case where the power of sale is not exercisable because the mortgage has been paid off. The answer is that it applies to that case as well as to every other. It is a case in which it is still a sale purporting to be made, although the mortgage money has been handed over, and the mortgagor has not taken either the precaution of getting back the mortgage deed, which he could have got back, or of getting a reconveyance, or an indorsement which would have the same effect." The Master of the Rolls did not there decide that the purchaser could not have taken the objection that the power was not properly exercised, or could not have made inquiries upon that point. The form of the proviso in that case is, "notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, so far as regards the safety and protection of the purchaser or purchasers, be deemed to be within the aforesaid power in that behalf, and to be valid and effectual accordingly." It might be suggested that this was merely a clause for the protection of the purchaser, and did not extend the power of sale; but I read the Master of the Rolls as saying that that was not the true view, and that it did extend the power of sale where there

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(1) 3 Ch. D. 600.

(1) 3 Ch. D. 603.

was some impropriety or irregularity in favour of a bonâ fide purchaser, which I think means a person who has entered into a contract for purchase. Contrast that with the language of the Conveyancing Act. The Act says: "Where a conveyance is made in professed exercise of the power of sale conferred by this Act the title of the purchaser shall not be impeachable," &c. That gives protection only to a purchaser who has obtained a conveyance. The protection accrues only after the conveyance has been made. I am asked to hold in this case that because the purchasers might have been able to take a conveyance at the date fixed for completion they are now precluded from inquiring whether the vendors were in a position to exercise the power of sale. I cannot ascribe such an effect to this provision. It appears to me that this provision is not applicable until after a conveyance is made, or, in other words, that the three sections of the Act which I have read confer protection only on a purchaser who has obtained a conveyance without knowledge of any irregularity; and consequently that it is left open to the purchaser, as between himself and the vendor, to raise any question which may properly be raised between a vendor and purchaser. The provisions of s. 21 are, I think, for the protection of the purchaser, and not for the benefit of the vendor. In my opinion, therefore, a mortgagee vendor selling under the power conferred by this Act will be bound, notwithstanding clause 2 of s. 21, upon the request of the purchaser, to shew that his power of sale was exercisable. Consequently, if in this case the purchasers had thought fit to make a requisition addressed to this point at the proper time, the vendors would have been bound to answer it. At the same time, I am not to be understood as saying that a purchaser without notice of any impropriety or irregularity would not be well advised to abstain from making any such requisition, for the efficacy of the protection afforded to the purchaser by s. 21 is established by *Bailey* v. *Barnes*. (1)

The conditions of sale, however, contain the usual provision, limiting the time for making requisitions, and it is said that it is now too late to make such a requisition. The answer of the purchasers to that is, "That may be so; but we take upon ourselves the burden of proving the allegation in the defence, that at the date fixed for completion the vendors were not in a position to sell. If that be so, though we may not be able to recover the deposit, we can resist specific performance." I think that that view is correct, and that the question is admissible and relevant, and ought to be answered.

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(1) [1894] 1 Ch. 25.

[The question was then put. Mr. Chapman replied that early in October, 1896, he instructed Mr. Stanley-Jones, who acted as his agent in the matter, to serve notice on the mortgagor demanding payment, and that such notice was served. Counsel for the defendants, being unable to elicit from the witness any particulars as to the nature of the notice, applied for an adjournment for the purpose of calling Mr. Stanley-Jones, but this was refused. Stirling J., in delivering judgment upon the whole case, held, first, that though the word "April" in the proviso for redemption required alteration to "June," the repetition of the word in the power of sale did not lead to any such manifest absurdity or incongruity as to justify the Court in altering it, and that, consequently, the power of sale in the deed did not arise till April 19, 1897; secondly, that no contrary intention was expressed in the deed so as to prevent the application of the power conferred by the Conveyancing and Law of Property Act, 1881, between June 19, 1896, and April 19, 1897, subject to the restrictions in the Act; thirdly, that the defendants had failed to prove that the requirements of the Act had not been complied with. In the result his Lordship gave judgment for specific performance, but without costs, and dismissed the counter-claim also without costs.]

Solicitors: *Stanley-Jones; Nicholl, Manisty & Co.*

H. B. H.

STIRLING J.

1898

June 8, 9, 18.

HOLFORD v. ACTON URBAN DISTRICT COUNCIL.

[1897 H. 4233.]

Building Scheme—Restrictive Condition—Positive Covenant—Implied Negative Stipulation.

Building land described as adapted for shops and business premises was put up for sale by auction subject to a condition that the purchasers of certain specified lots should respectively covenant with the vendors to erect within a given time on each of the lots respectively purchased by them a shop and dwelling-house of a given minimum value, but the lots in question remained unsold:—

Held, applying the test in *Oriental Steamship Co.* v. *Tylor*, [1893] 2 Q. B. 518, 527, that, having regard to the absence of any express provision as to the maintenance of the contemplated buildings when erected as shops and dwelling-houses, no negative stipulation ought to be implied that nothing but shops and dwelling-houses should be erected on the lots in question; consequently, that the vendors could not be restrained, at the instance of the purchaser of an adjoining lot, from erecting on the unsold lots a fire-engine station of a value exceeding the aggregate value of the contemplated buildings, there being no such departure from the condition as to render the whole transaction futile.

THIS was an action for an injunction to restrain the defendants from erecting on certain plots of land in High Street, Acton, comprised in lots 4, 5, 6, and 7 at a sale by auction on September 12, 1894, a fire-engine station, or any buildings other than shops and dwelling-houses of the respective values mentioned in the 9th condition of sale. The Acton Local Board, who were the predecessors in title of the defendants, acquired certain lands in High Street, Acton, for the purpose of widening the street. After that object had been satisfied, there remained vested in them certain surplus lands which were the subject of the sale, and which under the provisions of the Public Health Act they were bound to sell unless a scheme was sanctioned by the Local Government Board. Accordingly, on September 12, 1894, they put up this property for sale in several lots. The property was described in the particulars of sale as "freehold building land having frontages of 123 feet 6 inches to High Street and King Street, and adapted for first-class shops, or any business premises requiring roomy premises." The 9th condition of sale provided as follows: "The respective purchasers of lots 3, 4, 5, 6, and 7 shall, at their own expense, make and for ever maintain the walls and fences marked 'T' on the sale plan. The respective purchasers of lots 3, 4, 5, and 6 shall, within two months after the day fixed for completion, build a 9-inch brick boundary wall of the height of 6 feet above the finished level of the ground between their respective lots and lot 2. No side fence wall from the buildings to the back boundary wall shall be of less height than 5 feet or a greater height than 6½ feet. The side wall of any house other than the eastern wall of lot 3 and the western wall of lot 7 may be built as a party wall, that is to say, having one moiety of its thickness on an adjoining lot, and the adjoining owner or lessee on whose land such moiety of the thickness shall be built shall pay one moiety of the cost of the said party wall at current value when using the same for building purposes, and thereupon such property wall shall become the joint property and exist for the joint benefit of the owners of the buildings or lands separated thereby, who shall respectively have all the rights and be subject to all the obligations incident to owners of adjoining buildings separated by party walls. The purchasers of lots 3, 4, 5 and 6 shall, in their respective conveyances, enter into covenants with the vendors to erect within two years from the day of sale upon each of the lots bought by them a shop and dwelling-house of not less value at prime cost than 800*l.*, and the purchaser of lot 7 shall enter into a similar covenant to erect a shop and dwelling-house of not less value at prime cost than 650*l.* The purchaser of lot 2 shall covenant to erect and for ever maintain, at the entrance to his plot from High Street, a pair of substantial gates not less than 8 feet high, but nothing in the foregoing conditions shall absolve the purchaser of any lot from his statutory liability to comply in all respects with the by-laws of the board as to building or otherwise."

At the sale the plaintiff was the purchaser of lot 2. Lots 3 to 7 inclusive were not sold. The defendants, who had since become the successors of the local board under the Local Government Act, 1894, made some further attempts to sell these lots, but without success; and ultimately they obtained the sanction of the Local Government Board to the erection upon lots 4, 5, 6, and 7 of a building to be used as a fire-engine station, the prime cost of which was to be 3310*l*. The plaintiff alleged that the defendants were thereby infringing the building scheme, in the faith of which he bought his property.

The draft conveyance of lot 2 as originally prepared by the plaintiff contained a recital that the sale was made subject to and with the benefit of the 9th condition, which was set out in a schedule to the conveyance. The vendors objected that the property was not sold subject to the conditions generally, but only to the condition specifically relating to lot 2, and a correspondence ensued between the solicitors of the parties. On October 6, 1894, the plaintiff's solicitor wrote to the vendors' solicitors, maintaining that the recital was correct, but expressing his willingness to allow the vendors to reduce the cost of the houses to be erected from 800*l*. to 700*l*. To this the vendors' solicitors replied on October 15: "We are advised that your recital in draft conveyance as to the 9th condition of sale goes further than you are entitled to require. But we will not object to the textual incorporation in the conveyance of the 9th condition the building values being modified as stated in yours of 6th October and this will give you all you require by perpetuating the condition. We have revised the draft conveyance accordingly and return it herewith." On October 18 the plaintiff's solicitor wrote that he had obtained his client's execution to the conveyance, and proposing a day for completion; and in conclusion he expressed his willingness that the value of the building to be erected on lot 7 should be reduced to either 500*l*. or 550*l*., as the vendors should decide. The conveyance as finally settled recited that the sale was made subject to certain conditions, of which the 9th was set out in the first schedule thereunder written, and the schedule contained the 9th condition with the modifications agreed to in the correspondence.

The action originally came on upon a motion to strike out the statement of claim as shewing no reasonable cause of action; but it was ultimately arranged that the action should be tried in the form of a motion for judgment upon admissions made between the parties.

Jenkins, Q.C., and *Tanner*, for the plaintiff. The question is whether this case comes within that class of cases where a vendor selling to several persons plots of land parts of a larger property exacts from each purchaser a restrictive covenant which is intended for the common advantage of all the purchasers. It is a question of intention to be inferred from all the facts and circumstances of the case. An example is furnished by *Collins* v. *Castle*. (1) That was a case between purchaser and purchaser; but this case is stronger, because there is direct privity between the defendants and the plaintiff. The general principles upon which the Court acts in such cases are to be gathered from *Spicer* v. *Martin*. (2)

The intention in this case was that each purchaser should be entitled to enforce the restrictive conditions against the vendors as well as against other purchasers: *In re Birmingham and District Land Co. and Allday*. (3) The plaintiff is entitled to restrain the defendants from dealing with the unsold land in any way inconsistent with the covenants which they exacted from their purchasers.

Butcher, Q.C., and *MacSwinney*, for the defendants. It was never intended that the defendants should be bound by these conditions. The conditions are all affirmative, and there is no case in which such conditions have been enforced by injunction even between purchasers, though there are cases in which damages have been recovered. The doctrine of *Tulk* v. *Moxhay* (4) will not be extended to covenants to do acts relating to the land: *London and South Western Ry. Co.* v. *Gomm* (5); *Austerberry* v. *Oldham Corporation* (6), overruling *Cooke* v. *Chilcott*. (7) See also *Ryan* v. *Mutual Tontine Westminster Chambers Association*. (8) In the cases cited on behalf of the plaintiff the covenant was negative in its terms.

(1) (1887) 36 Ch. D. 243.
(2) (1888) 14 App. Cas. 12.
(3) [1893] 1 Ch. 342.
(4) (1848) 2 Ph. 774.
(5) (1882) 20 Ch. D. 562.
(6) (1885) 29 Ch. D. 750.
(7) (1876) 3 Ch. D. 694.
(8) [1893] 1 Ch. 116.

[*Jenkins, Q.C.* I admit that if these conditions are treated as being purely affirmative the plaintiff cannot succeed; but I say that a negative stipulation is in substance to be implied.]

If it is admitted, as it must be, that the express stipulation as to building is not binding on the defendants, it is impossible to imply from that some other stipulation which is binding. Where a positive contract cannot be enforced, no implied negative stipulation will be enforced. This is illustrated by the cases on contracts for personal service: *Whitwood Chemical Co.* v. *Hardman* (1), overruling *Montague* v. *Flockton.* (2) The conditions contain nothing to prevent a purchaser from erecting a building of the prescribed description and then pulling it down and erecting other buildings. Consequently no such far-reaching negative stipulation as is here suggested can or ought to be implied.

Moreover, it was beyond the powers of the defendants to subject the land to such a covenant while in their possession, or to prevent themselves from selling it free from such restrictions: Public Health Act, 1875, ss. 154, 175, 176. Trustees for public purposes cannot subject themselves to restrictions which would have the effect of preventing them from fulfilling their public duties: *Ayr Harbour Trustees* v. *Oswald* (3); *Mulliner* v. *Midland Ry. Co.* (4) And see *In re Higgins and Hitchman's Contract* (5) and *Davis* v. *Leicester Corporation.* (6) The question whether the defendants could now sell free from the restrictive conditions does not arise; but we submit that they would be bound to sell so as to obtain the best possible price.

[They also referred to *Attorney-General* v. *Teddington Urban Council.* (7)]

Jenkins, Q.C., in reply.

[STIRLING J. I need not trouble you upon the question whether the purchaser was intended to have the benefit of the conditions.]

(1) [1891] 2 Ch. 416.
(2) (1873) L. R. 16 Eq. 189.
(3) (1883) 8 App. Cas. 623.
(4) (1879) 11 Ch. D. 611.
(5) (1882) 21 Ch. D. 95.
(6) [1894] 2 Ch. 208.
(7) [1898] 1 Ch. 66.

With regard to the implied negative, the conditions and the surrounding circumstances shew that this plot was sold upon a representation that the adjoining plots should be used for business premises and dwelling-houses, and it is clear from the correspondence that the purchaser attached importance to that, and that the board knew it. A condition in a case of this kind that a purchaser shall build a shop and dwelling-house of a given value involves a condition that the vendor shall not use the unsold plots in a manner inconsistent with that condition. This obligation is an equity arising from the representation of the vendor and the fact that he has obtained money on the strength of that representation, and upon this view of the case the cases upon contracts for personal service have no application. It is not conclusive to say that, because there is here no negative covenant, this obligation on the part of the vendor cannot be enforced: *Doherty* v. *Allman.* (1) *Tulk* v. *Moxhay* (2), where the covenant was positive in form, proceeds on the same principle.

[STIRLING J. I can see nothing in this covenant to prevent the alteration of the buildings after they are built.]

I submit that it would be a breach of the condition to use the buildings for any other purpose.

With regard to the authority of the defendants, it must be assumed that the board in putting up the land for sale subject to these conditions thought that they were doing the best for the ratepayers.

Cur. adv. vult.

June 18. STIRLING J. (after stating the facts). The first question is whether the vendors have come under any obligation to the purchaser in respect of the observance of the covenant referred to in the 9th condition. Apart from the question of their position as a local authority, which is not like that of a natural person sui juris, free to do as he pleased with the lands, it appears to me that they have come under such an obligation. I do not think that I need go into the cases upon that. I shall be content to refer to the statement of the law by North J. in

(1) (1878) 3 App. Cas. 709, 720.

(2) 2 Ph. 774.

the case of *Davis* v. *Leicester Corporation* (1) and the cases to which he referred. I think that the insertion of the 9th condition in the schedule to the conveyance clearly shews that the purchaser was meant to have the benefit of that as against the purchasers of the other lands, and that in those circumstances the defendants, the vendors, come under an obligation to observe those stipulations to the same extent that they would restrict the user of the land by a purchaser if the lots had been sold.

The next question is, what restriction arises out of this 9th condition? Now it was pointed out, and it is an important observation, that no express stipulation or condition is to be found with respect to the user of the buildings when once erected. It is not, however, I apprehend, necessary, in order to impose on the defendants an obligation of this kind, that there should be an express stipulation that the user of the property should be confined in a particular way, or that a particular use should not be made of the property. The general rule on the subject is very briefly and tersely stated by Bowen L.J. in one sentence in the case of *Oriental Steamship Co.* v. *Tylor* (2), namely, that, "where the contract as expressed in writing would be futile, and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual." Many illustrations may be given of the application of that rule. I may refer to two. One is the case of *Leader* v. *Moody* (3), before Sir George Jessel, where it was held that where a lease had been granted of a box in the opera-house the lessor was not at liberty afterwards to make structural alterations in the opera-house with the view of adapting it for use for religious services. Another, and more recent case, is *Hudson* v. *Cripps* (4), before North J., where a building had been erected and was being let out in flats to private tenants, and it was held that where one flat had been let the owner of the rest of the property was not at liberty to convert it into a club, and make structural alterations for that purpose. It appears to me plain that it may be discovered from an examination of all the facts and circumstances that the meaning of the parties was that a particular thing should not be done; but the Court must be very careful not to imply restrictions unless it is satisfied that these were fairly within the contemplation of the contract, judging from the terms in which it is expressed. That brings me to the further consideration of these particulars and conditions of sale. The description of the property in the particulars is "freehold building land adapted for first-class shops, or any business requiring roomy premises." So far, therefore, the buildings are not limited to shops. The most material part of the 9th condition is, "the purchasers of lots 3, 4, 5, and 6 shall, in their respective conveyances, enter into covenants with the vendors to erect within two years from the day of sale upon each of the lots bought by them a shop and dwelling-house of not less value at prime cost than 800*l*., and the purchaser of lot 7 shall enter into a similar covenant to erect a shop and dwelling-house of not less value at prime cost than 650*l*."

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(1) [1894] 2 Ch. 208, 219.

(2) [1893] 2 Q. B. 518, 527.

(3) (1875) L. R. 20 Eq. 145.

(4) [1896] 1 Ch. 265.

Now, it is quite clear, upon the authorities—indeed, it was conceded that that positive obligation could not be enforced against the vendors. They cannot be compelled to erect shops or dwelling-houses upon the land, and no damages could be recovered against them if they did not. The plaintiff relies entirely upon the equitable doctrine which is established by *Tulk* v. *Moxhay* (1) and subsequent cases. But it is important to observe that in other portions of the conditions there are stipulations as to what would take place after the erection of the buildings contemplated. The purchaser of lot 2 was to erect and maintain at the entrance to his building at High Street substantial gates. There is no obligation imposed by this covenant to maintain the shops and dwelling-houses when built. It does also appear to me that there is a restriction as to the value of the buildings which are to be erected. Each house was to be of not less value, according to the conditions of sale, than 800*l*. prime cost on four of the lots, and on the fifth of not less value than 650*l*. These terms were

(1) 2 Ph. 774.

altered as to the price of the shops and dwelling-houses by agreement between the plaintiff and the defendants in the way which was pointed out in the correspondence, and it is not immaterial to observe that that was a matter which was prominently in the contemplation of both parties, as shewn by the correspondence. Therefore it does seem to me that this was a restrictive condition as to the value of the buildings to be erected; but in the present case the building which is proposed to be erected is of the value of 3310*l.*, which exceeds the total amount of the value of the separate buildings which were contemplated by the condition as to be erected; so that in that respect the restrictive condition is satisfied. But there are two matters in which the conditions of sale are departed from—first, that one building is to be erected on four lots instead of a separate building on each lot; and, secondly, that the building which is proposed to be erected is not in any sense a shop and dwelling-house, or a shop or dwelling-house, nor, indeed, in a strict sense can it be said to be a building adapted for a business such as is referred to in the conditions of sale.

Now, ought I to imply from the conditions of sale that there is any stipulation that nothing but separate buildings shall be erected, or that nothing but shops and dwelling-houses shall be erected upon the land? It is to be observed that there is no covenant—no express stipulation that the buildings to be erected shall be maintained for ever as shops and dwelling-houses. There is nothing, as it seems to me, to prevent a person who bought all the lots from erecting in the first instance buildings which were shops and dwelling-houses, and afterwards throwing them into one by alterations of the party walls between them, or from using the single building so formed otherwise than as a shop or dwelling-house. Such a restriction ought not to be implied except when the contract as expressed in writing would, in the language of the Lord Justice, be futile, or would not carry out the intention of the parties. It does not seem to me that such a restriction could fairly be said to have been within the contemplation of the parties, or that the condition as it stands is futile, and does not carry out the intention of the parties. That being so as regards the shops and dwelling-houses when once erected, I do not think I ought to infer a negative stipulation that nothing but shops and dwelling-houses should be erected. No doubt this is a departure from the conditions of sale; but I cannot see that is such a departure as would render the whole transaction futile, as it would be rendered futile, for example, by the erection of a shop or a manufactory upon property which had been sold for residential purposes.

In my judgment it would be going too far to imply any such restrictive condition; and I therefore think that the plaintiff is not entitled to the relief which he asks.

[The action was dismissed with costs to be paid to the defendants as between solicitor and client according to the Public Authorities Protection Act, 1893, except that they were ordered to pay the extra costs, if any, incurred by the plaintiff by reason of the original form of their motion.]

Solicitors: *Burton, Yeates & Hart, for T. H. Engall, Acton; Hemsley & Hemsley.*

H. B. H.

KEKEWICH J.

1898

May 6, 7, 11, 24.

HEAD v. GOULD.

[1897 H. 3195.]

Trustee—Breach of Trust—New Trustees—Retiring Trustees, Liability of—Unauthorized Investments—Order against Trustees—Trustees taking over Securities — Cestui que Trust—Infant — Claim against Co-trustee — Indemnity—Solicitor—Third Party Notice.

To make a retiring trustee liable for a breach of trust committed by his successor, it must be proved that the very breach of trust which was in fact committed was not merely the outcome of or rendered easy by the retirement and new appointment, but was contemplated by the former trustee when the retirement and appointment took place.

Where one of two trustees by whom a breach of trust is committed is a solicitor, he cannot, merely because he is a solicitor, be required to indemnify his co-trustee where that co-trustee has himself been an active participator in the breach of trust and has not participated in it merely in consequence of the advice and control of the solicitor.

The rule of equity that trustees who have caused a loss by investing trust funds on an unauthorized security cannot be required by the cestui que trust to make good the loss without having the security transferred to themselves, does not apply where the cestui que trust is an infant; he being entitled to have the trust fund made good by the trustees notwithstanding the security cannot be transferred to them.

In re Salmon, (1889) 42 Ch. D. 351, considered.

By the marriage settlement dated June 14, 1865, of Robert William Head, a solicitor practising in Exeter, and Harriette Julia Emmaline Head, a sum of 2000*l.* to which the lady was entitled under a will was agreed to be assigned to two trustees upon trust for investment and to hold the trust fund upon the usual trusts for the wife and husband successively for life, with powers of appointment in favour of children, which were never exercised, and in default of appointment for the children of the marriage at twenty-one or marriage in equal shares. And the settlement contained a power for the trustees during the lives of the husband and wife or the life of the survivor, with their, his, or her consent in writing to raise any part, not exceeding one-half, of the presumptive or vested share of any child and apply the same for his or her "preferment, advancement, or benefit"; and this was followed by a maintenance and education clause in the usual form.

By a post-nuptial settlement dated January 13, 1868, and made by R. W. Head, he conveyed to two trustees, first a house No. 24, Southernhay, Exeter, of which he was seised in fee simple subject to a mortgage for 225*l.* and interest; secondly, a house No. 1, West Cliff Terrace, Seaton, Devonshire, to which he was entitled in fee simple upon the death of his father; and, thirdly, a house No. 6, West Cliff Terrace, to which he was entitled for his life, to hold to the trustees upon trust for sale, and to hold the proceeds upon trusts for Mrs. Head and himself successively for life with powers of appointment in favour of their children which were never exercised, and in default of appointment for the children of himself and his said wife at twenty-one or marriage in equal shares, "subject to full discretion on the part of the trustees to apply the same moneys for the benefit of the infant children presumptively entitled thereto." This settlement did not in terms contain any maintenance or education clause beyond that just quoted, nor did it contain any investment clause.

R. W. Head died on February 27, 1881, leaving his widow surviving him, and having had issue of his marriage four children, of whom one died in infancy. The other three were Robert Trevelyan Head, who had since attained twenty-one and was now in Japan, Adelaide Caroline Head, who had also since attained twenty-one, and William Raleigh Head, now an infant.

By an indenture dated November 30, 1887, Cecil R. M. Clapp was, under a power contained in the settlement of 1865, appointed by Mrs. Head a trustee of that settlement in place of a retiring trustee, and jointly with Edward H. Houlditch, the continuing trustee.

By an indenture dated November 17, 1893, Messrs. Houlditch and Clapp were, under a power in the settlement of 1868, appointed by the surviving trustee, who was desirous of retiring, trustees of that settlement. Both Houlditch and Clapp were solicitors, and Clapp from that time acted as solicitor to the trusts of both settlements.

In or about the year 1883 Mrs. Head began to get into pecuniary difficulties, and in that year and subsequently she applied to the trustees for the time being of the settlement of 1865 for and obtained advances out of the capital of the trust funds to enable her to maintain herself in her social position and also to maintain and educate her children. In December, 1893, at her urgent request, Messrs. Houlditch and Clapp advanced 1500*l*., part of the trust funds subject to that settlement, in paying off a sum of 1500*l*. which had been advanced to her by one Jerred on the security of a mortgage of her life interest under both settlements and of certain policies on her life for 500*l*. each, and they thereupon took a transfer of the securities. The securities were not investments within the powers of the trustees. Messrs. Houlditch and Clapp stated that their object in investing the 1500*l*. in paying off Jerred's mortgage was to increase Mrs. Head's income and so to enable her to maintain and educate her children, the interest she had to pay on the mortgage being 5 per cent., while under the settlement she was entitled to 4 per cent. only.

Messrs. Houlditch and Clapp, at the urgent solicitations of Mrs. and Miss Head and to assist the former in her embarrassments, subsequently from time to time advanced to Mrs. Head other parts of the trust funds comprised in the settlement of 1865 for the maintenance of herself and her children. By the middle of 1894 the whole of Miss Head's one-third share of the trust properties had been advanced to her or her mother, and her brother Robert T. Head had also received his one-third share, he having made repeated requests for advances both for himself and also to assist his mother, so that the property then remaining upon the trusts of the settlements represented only the presumptive one-third share of the infant William Raleigh Head.

In August, 1894, Miss Head attained twenty-one, and shortly afterwards she began making urgent appeals to Messrs. Houlditch and Clapp to make further advances to her mother. On September 5 Clapp wrote to Miss Head that the trustees had gone to the utmost limit of payments to her mother, and that the only further suggestion he and his co-trustee could make was that they should be released from the trusteeship, " which we shall be glad to hand over to others." Mrs. Head also wrote on September 11 to Clapp asking for an advance and offering as a security to make over her furniture to the trustees in trust for her daughter, to which Clapp replied on the following day that the trustees had no means of raising cash, and added, "The only way we can assist you is by handing over the trust to others, as we are most desirous of doing." Mrs. Head then wrote to Clapp on September 13 asking how a change of trustees would assist her and her daughter, to which he replied the next day, "By getting new trustees to help you in the way you ask us to do—advance your daughter more money. We decline the risk and responsibility: others may be induced to accept it and to assist you." Miss Head, on September 13, wrote also to Houlditch asking how a change of trustees would help them: "Could I be a trustee?" To which Houlditch replied that no further moneys could be advanced till her brother Raleigh was of age and then only with his assent. He also suggested her brother Robert T. Head and herself being trustees of what remained of the funds, "but as these appear to represent only Raleigh's share I do not see that it will help, though I should be glad to be relieved."

Robert T. Head, being in Japan and therefore ineligible for a trustee, Mrs. Head ultimately, on October 4, wrote to Clapp stating that her daughter was quite willing to be one of the new trustees, and that an old and intimate friend of the family, a solicitor named George Domett Gould, would be the other, adding, "As you say, it is the only way to help us." Gould, who, it appeared, had been under some obligations to the Head family, being also willing to act, two deeds, each dated November 12, 1894, were executed whereby under the powers contained in the settlements he and Miss Head were appointed trustees of such settlements in the place of the two retiring trustees, Houlditch and Clapp, Mrs. Head being the appointor under the settlement of 1865, and Messrs. Houlditch and Clapp being the appointors under the settlement of 1868, and the trust property in both cases being conveyed to the new trustees by Messrs. Houlditch and Clapp. Gould was apparently a man of little or no means, holding the position of managing clerk to a firm of solicitors in Wakefield. Miss Head was then residing, as she always had done, with her mother, and she continued to reside with her after the appointment. She was apparently under her mother's influence, as Messrs. Houlditch and Clapp were well aware before their retirement, for in a letter to Robert T. Head respecting the position of the trusts and dated February 22, 1894, Clapp said, "We cannot conceal from ourselves the fact that your sister is acting under her mother's influence." From the date of his appointment Gould proceeded to act as solicitor to the trusts in place of Clapp. At that time the property remaining on the trusts of the settlements, and representing the one-third share of the infant William Raleigh Head, were (1.) the house No. 1, West Cliff Terrace, (2.) the 1500*l.* purporting to be secured by Mrs. Head's two life policies for 500*l.* each, and (3.) an interest by way of charge on the house No. 6, West Cliff Terrace.

In April, 1896, G. D. Gould and A. C. Head sold No. 1, West Cliff Terrace, and handed over the proceeds to Mrs. Head. With Mrs. Head's concurrence both the life policies were surrendered by the new trustees, one on May 25, 1895, and the other on November 30, 1896. As to the third item, there was nothing to shew what had become of it. Thus the whole of the trust property representing the infant's share had disappeared. Shortly before his appointment as trustee Gould had some correspondence with Clapp as to the state of the trust and the position of the trust property, when Clapp informed him of the advances from time to time made to save Mrs. Head from impending bankruptcy, and that as he and his co-trustee had "had worry enough," they had asked her to release them. Clapp also stated that the trustees had a balance in their hands of 10*l.* 6*s.* 7*d.*, which he said "must be put right to close the account." On November 2, 1894, Gould replied, saying he had to his great regret found Mrs. Head "in most difficult circumstances," and that it was necessary she should have some funds at once; and he accordingly asked Clapp to get Houlditch to join in sending her a cheque for the 10*l.* 6*s.* 7*d.*, for which he, Gould, would see Clapp and Houlditch were held harmless. Accordingly on November 6 Clapp sent Gould a cheque for that sum, which was then handed to Mrs. Head. In consequence of the loss of the infant's share under the circumstances above mentioned, the writ in this action was issued on September 25, 1897, but was subsequently amended both as to parties and as to the relief claimed. In the writ in its amended form Mrs. Head's son, William Raleigh Head, an infant of seventeen, appeared as plaintiff, by his next friend, the defendants being G. D. Gould and A. C. Head, the present trustees of the settlements, Messrs. Houlditch and Clapp, the late trustees, and Mrs. Head. The plaintiff claimed (1.) execution of the trusts of the two settlements; (2.) a declaration that the defendants Houlditch and Clapp were jointly and severally liable to replace or otherwise make good to the property subject to the trusts of the first settlement all loss occasioned by their having advanced moneys forming part of the trust estate on the security of the life interest of the defendant Mrs. Head in the trust property, or otherwise on improper or inadequate security; (3.) that all the defendants might be declared liable and might be decreed to make good to the estate subject to the trusts of the settlement of 1868 the moneys which had arisen from the sale of No. 1, West Cliff Terrace, or such part thereof as had not been duly applied in accordance with the trusts of such settlement; (4.) accounts of all moneys received by the defendants Gould, A. C. Head, Houlditch, and Clapp, or any of them, as trustees of the two settlements and of their application of the same; and (5.) appointment of new trustees of both settlements.

By his statement of claim the plaintiff alleged that the appointment of the defendants Gould and Miss Head as trustees of the settlements was improper, for as to Miss Head, she had then recently attained twenty-one, was living at home with her mother, was wholly under her control, and was ignorant of all business matters; and as to the defendant Gould, he was a person practically of no means and an intimate friend of the defendant Mrs. Head, so that neither of such new trustees was in a position to protect the trust property or the plaintiff's interest therein, of which facts the defendants Houlditch and Clapp were well aware. The plaintiff further alleged that at the time of the appointment Mrs. Head was in urgent want of money; that the defendants Houlditch and Clapp had declined to make her any further advances, but had retired at her request and with the knowledge that she would obtain them from the defendants Gould and Miss Head, and that under the circumstances the defendants Houlditch and Clapp were responsible for all losses occasioned by the acts of the defendants Gould and Miss Head.

The defendants Houlditch and Clapp delivered a defence in which they admitted having advanced the 1500*l*. on mortgage of Mrs. Head's life interest and policies, but said that they did so at Mrs. Head's instigation and request; that they believed the securities to be good and sufficient, and that the transaction effected a saving of 1 per cent. per annum for Mrs. Head. They further stated that if a loss had resulted from the investment, it had arisen, not from any insufficiency in the security, but from improper dealings since they had ceased to be trustees. They then went on to say that they had from time to time made advances out of the trust property to Mrs. Head for the maintenance, education, and advancement of her children, including the infant plaintiff, and that such advances had been made at the urgent solicitation of herself and her daughter, and on several occasions to avert from Mrs. Head imminent bankruptcy. While admitting that they were anxious to retire from the trusts, they denied having ever suggested or procured the appointment of Gould and Miss Head as trustees. As to Miss Head, she having received her one-third share of the trust funds, and being therefore no longer beneficially interested was believed by them to be a proper person as trustee, being a woman of intelligence and business capacity; and with regard to Gould, he being a solicitor and of good professional position, as they had ascertained, they believed him likewise to be a proper person as trustee; and it was untrue that they had ever been in any way parties to any scheme by which, in order to commit a breach of trust, new trustees should be appointed in their place. They further alleged that since the appointment of new trustees they had had nothing to do with and were ignorant of the dealings with the trust property, and that such loss, if any, as had accrued was chargeable against the defendants Gould and Miss Head, and to the defendant Mrs. Head in instigating a breach of trust, and not to themselves; that the moneys received by Mrs. Head from time to time had been largely, if not wholly, applied for the maintenance or benefit of the infant plaintiff, and that therefore in any accounts that might be directed credit should be given by him for any moneys so applied. They then stated that if there had been a breach of trust on their part for which they were responsible, they had acted honestly and reasonably, and they claimed the benefit of s. 3 of the Judicial Trustees Act, 1896. They also pleaded a deed of release and indemnity dated December 8, 1893, and executed to them by Mrs. and Miss Head, and claimed to be indemnified thereunder as well by Gould and Miss Head, as the primary perpetrators of the alleged breach of trust, as by Mrs. and Miss Head under the covenant for indemnity in such deed, and by Mrs. Head as the person at whose instigation and request such breach of trust had been committed; and they submitted that to effectuate such right of indemnity any interests of Mrs. and Miss Head in the settled property should be impounded.

Miss Head also delivered a defence in which she said that though nominally appointed trustee, she was so appointed without understanding in any way the nature of the appointment and its effect, and that she never at any time took any responsible or active part in the duties of the trust, and never understood her legal position or duty in the matter, and that she acted as trustee (so far as she acted at all) without proper information and in reliance upon the representations of her co-trustee, Gould, as to the propriety or expediency of matters; that in particular, as to the sale of No. 1, West Cliff Terrace, she concurred therein under the advice and direction of her co-trustee, and without any knowledge or independent advice as to the object or propriety of such sale, and that she never as trustee received any of the proceeds or knowingly authorized any application of the same, and that she believed they had been received and dealt with by Gould exclusively. She also denied ever having actually received or had control over any of the trust property. She further expressed her willingness to render all accounts in her power and her wish to retire from the trusts: she claimed the benefit of s. 3 of the Judicial Trustees Act, 1896, and also that as her co-trustee, Gould, was a solicitor, and assumed to act as solicitor to the trust estate and as sole trustee thereof, and to exercise exclusive control of the administration of the trust funds, and as she acted under his direction and advice, she was entitled to be indemnified by him against all liability.

Mrs. Head delivered a defence in which she admitted that advances had been made to her by the trustees for the time being and applied by her for the maintenance, education, and advancement of her children under the powers in the settlements. She denied that the defendants Houlditch and Clapp retired at her request. She also said that part of the proceeds of the sale of No. 1, West Cliff Terrace had been advanced to her for the maintenance, &c., of her children, but that the remainder had been retained by Gould and had not yet been accounted for by him.

The defendant Gould also delivered a defence, but as he failed to comply with an order for an affidavit of documents his defence was ordered to be struck out.

The defendants Houlditch and Clapp delivered to Gould, Miss Head, and Mrs. Head a third-party notice claiming to be indemnified by Gould and Miss Head in respect of the trusts of the two settlements, on the ground that the loss and misapplication of any of the trust funds, or any part thereof, occurred after the retirement of them, Houlditch and Clapp, from the position of trustees of the said settlements, and were caused and committed by Gould and Miss Head as trustees thereof; and also claiming to be indemnified by Mrs. Head as the instigator of the alleged breaches of trust, and by Mrs. and Miss Head under the deed of indemnity of December 8, 1893, so far as regarded the 1500*l*.

The defendant, Miss Head, also delivered a third-party notice to her co-trustee, Gould, claiming to be indemnified by him against loss by reason of the breaches of trust, on the ground that the loss and misapplication (if any) of the trust funds, or any part thereof, were occasioned entirely by his acts or defaults, and that he assumed to act as solicitor to the trust estate and as sole trustee thereof, and exercised control of the administration of the trust funds, and that whatever was done by herself in connection with the trust was at his instigation and in reliance upon his advice.

Issue having been joined, the action now came on for trial on oral evidence.

Miss Head, Houlditch, and Clapp were all examined and cross-examined at considerable length upon their dealings with the trust funds. The effect of their evidence is sufficiently stated in the judgment. Voluminous correspondence between the several parties, extending over several years, was also read, shewing the pecuniary straits and difficulties to which Mrs. Head and her family had been reduced, and the frequent and urgent importunities by herself and her daughter to which the trustees, Houlditch and Clapp, were subjected and which in fact led them to retire from the trust.

P. O. Lawrence, Q.C., and *Methold*, for the plaintiff. The main question is whether the old trustees, Houlditch and Clapp, can be rendered liable, as well as the new trustees, for the loss of the trust estate. We submit that they can. It is clear from the correspondence that Mrs. Head, the tenant for life, was at all times in great pecuniary difficulties; that the old trustees retired on account of her importunities to commit fresh breaches of trust by handing over capital trust funds to her; that they suggested that what they would not do themselves might be done by new trustees; and that they were willing to retire in favour of persons who they must have known were improper to be appointed trustees, one being a daughter of the tenant for life, under her control, and only just of age, and the other a solicitor of small means and an old and intimate friend of the tenant for life. Under such circumstances, the old trustees have brought themselves within the rule laid down in Lewin on Trusts, 9th ed. p. 752, that, where a trustee who is unwilling, when solicited, to commit a breach of trust resigns in favour of some other person less scrupulous, the Court, acting on the principle of qui facit per alium facit per se, will hold the trustee who retires responsible for the misbehaviour of the trustee he has substituted. To escape liability the retiring trustees must shew they have reasonable grounds for believing that the trust funds will be safe in the hands of the new trustees: *Webster* v. *Le Hunt* (1); *Clark* v. *Hoskins* (2); *Palairet* v. *Carew*. (3) Here it is impossible that the old trustees could have had any reasonable grounds for believing that the trust funds would be safe in the hands of such persons as were proposed to be appointed in their place. We therefore submit we are entitled to the several items of relief we claim.

Warrington, Q.C., and *Rowden*, for the defendants, Houlditch and Clapp. The investment of the 1500*l.* was, no doubt, a breach of trust, but there was no dishonesty in it. It was in fact a meritorious breach of trust committed with the object of saving 1 per cent. of interest for the tenant for life.

[KEKEWICH J. I acquit your clients wholly and entirely of dishonesty.]

The investment was not an authorized but insufficient investment; it was one wholly unauthorized, and which never formed part of the trust funds, and therefore, if we are called upon to pay, we are entitled to say, upon the principle stated by your Lordship and not dissented from by the Court of Appeal, that we will have the security returned to us: *In re Salmon* (4); but as a matter of fact we cannot have it back, because the new trustees have destroyed it by surrendering the policies, and have thus put it out of our power to have back the security as in *Smethurst* v. *Hastings* (5) and other cases. Therefore, we cannot in fairness be held liable for that 1500*l.* The tendency of more recent legislation is not to be hard on honest trustees.

Then, upon the question whether the old trustees are liable for the breach of trust committed by the new trustees: in order that such a case should be made out against them it must at least be shewn that the new trustees were appointed expressly in order that they might commit a breach of trust which the outgoing trustees refused or were unwilling to commit. There is no evidence to that effect. Gould, one of the new trustees, was a responsible person who knew what the duties of a trustee were, and there was no ground for suspecting him. There is no evidence whatever that a breach of trust was in contemplation, nor is there anything to shew that the old trustees were ever asked to deal with the securities appropriated to or reserved for the share of the infant. The case is not within the principle laid down in Lewin on Trusts, 9th ed. p. 752, and cases there cited.

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(1) (1860) 8 W. R. 534; (1861) 9 W. R. 918.

(2) (1867) 36 L. J. (Ch.) 689; (1868) 37 L. J. (Ch.) 561.

(3) (1863) 32 Beav. 564, 567–8.

(4) 42 Ch. D. 351, 357.

(5) (1885) 30 Ch. D. 490.

Then it must be borne in mind that the settlements contain claims for children's advancement or "benefit," a very wide word: *In re Breed's Will.* (1) Therefore, when corpus has been paid away by trustees for the "benefit" of an infant, as in the present case, they should be allowed the payment in their accounts.

J. M. Gover, for the defendants, Mrs. and Miss Head. With regard to Mrs. Head, any order for impounding her interest can have no effect: therefore, it is immaterial whether such an order is made or not. As to Miss Head, I cannot contend that there has not been a breach of trust; but I ask your Lordship to give her the benefit of s. 3 of the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), and relieve her from personal liability for the breach of trust on the ground that she acted "honestly and reasonably." This case differs from that of *In re Turner* (2), where the Court refused to grant relief under that section, for there the trustees seeking to be relieved had business experience, whereas here she had none. At all events Miss Head is entitled, having regard to the relations between her and her co-trustee, Gould, to be indemnified by Gould, in accordance with the well-settled principle (3), and with *Lockhart* v. *Reilly* (4) and *Thompson* v. *Finch* (5): Lewin on Trusts, 9th ed. p. 1042.

(1) (1875) 1 Ch. D. 226.
(2) [1897] 1 Ch. 536.
(3) Ibid. 544.
(4) (1856) 25 L. J. (Ch.) 697.
(5) (1856) 22 Beav. 316; 8 D. M. & G. 560.

With regard to the 1500*l.* mortgage, I admit that neither Mrs. nor Miss Head can make any claim against the old trustees for the breach of trust, since those ladies gave them a covenant of indemnity.

The defendant Gould did not appear by counsel.

P. O. Lawrence, Q.C., in reply. *In re Salmon* (1) is distinguishable, for there the party suing was sui juris, and had concurred in the investment, knowing it was unauthorized; and it was held that he should elect to accept or reject the unauthorized investment. But that case cannot apply where, as here, the party suing is an infant. Again, in *Re Massingberd's Settlement* (2) the Court held that, though the security was realized, yet, as it was an unauthorized security, the trustees were bound to make good the deficiency that had occurred.

As to any sums advanced to the infant for his benefit, I admit they should be deducted from his share, but no direction should be given on this point until the facts have been inquired into by the master.

Lastly, as to the liability of the old trustees for the acts of the new, the case substantially amounts to this. The old trustees say, "We will not accept the responsibility for what you, the cestuis que trust, ask us to do, but we will help you to this extent, that we will find you more accommodating persons." They therefore retired to enable more accommodating trustees to do what they themselves could not do without a breach of trust. Neither of the new trustees were proper persons. Gould was not proper because the old trustees, though they made some inquiries as to his respectability, did not inquire into his means of replacing the trust funds; and as to Miss Head, appointing her was equivalent to appointing Gould to act alone, for she was, as the old trustees well knew, under the influence of her mother, who was in dire straits. The old trustees are not discharged until they appoint fit and proper persons to succeed them.

Cur. adv. vult.

May 24. KEKEWICH J. It is beyond dispute, and in truth it was not disputed, that breaches of trust have been committed alike by the former and present trustees of the settlements of 1865 and 1868; and there is too much reason to fear that the infant plaintiff will be disappointed in large measure of the provision intended to be made for him by those settlements.

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(1) 42 Ch. D. 351.

(2) (1890) 63 L. T. 296.

The main question falling for decision is to what extent the several defendants can be held responsible towards the plaintiff, and, as between themselves, for the loss thus occasioned. It matters little in what order the points necessary to be determined for this purpose are taken; but there is some convenience in dealing first with the defendants who stand first on the record, and the logical though not the chronological order of events points in the same direction.

When the defendants George Domett Gould and Adelaide Caroline Head were appointed trustees of the settlement in 1894, the trust property consisted of a house No. 1, West Cliff Terrace, Seaton, 1500*l.* secured by policies on Mrs. Head's life (the premiums being payable out of her life income), and an interest by way of charge on another house No. 6, West Cliff Terrace, Seaton. This property has wholly disappeared. What has happened to the 3rd item has not been in any way explained, and I must leave that to be ascertained, if it usefully can be, by inquiries to be directed by the judgment. The house No. 1, West Cliff Terrace, has been sold, the policies have been surrendered, and the proceeds of such sale and surrender have been received by the trustees and dissipated. It may be that on prosecuting the inquiries some justification for the expenditure of some part of these moneys will be discovered, and I do not intend to preclude the trustees from availing themselves of any justification which the facts when ascertained permit; but for aught that yet appears they have been squandered on Mrs. and Miss Head, and at any rate they are gone, and no account is forthcoming. Under these circumstances it is a matter of course to make the trustees G. D. Gould and A. C. Head liable as on breach of trust for the sale and surrender, and for the proceeds which they have received. They must also be removed from the trust, though for the present, at least, there is no possible advantage in appointing new trustees in their place.

It will be convenient here at once to deal with the claim made by Miss Head against her co-trustee Gould. By her third-party notice she seeks to be indemnified by him against loss by reason of the breaches of trust, on the ground that the loss and misapplication (if any) of the trust funds, or any part thereof, were occasioned entirely by his acts or defaults, and that he assumed to act as solicitor to the trust estate and as sole trustee thereof, and exercised control of the administration of the trust funds, and that whatever was done by herself in connection with the trust was at his instigation and in reliance upon his advice.

This is a serious charge, and if it had been proved would have entitled her to the relief claimed according to well-known and well-recognised principles. Mr. Gover, in support of the claim, relied on the decision of Byrne J. in *In re Turner* (1); but it is to be observed that the learned judge did no more than follow *Lockhart* v. *Reilly* (2), and act upon the principles there enunciated and to which I have alluded. There is before me no evidence bringing the case within those principles, or shewing that the charge which is correctly formulated on them is consistent with the facts. My conclusion from such evidence as there is before the Court is distinctly adverse to the claim. I know that, before the appointment of herself and Gould as trustees, Miss Head was an active party to the importunities of her mother which induced the former trustees to commit a breach of trust for their benefit, and that she looked to the change of trustees as a means of, in some way or other, obtaining further advances. I know further that she was well acquainted with the position of the trust, and that it was all-important to maintain the policies and to appropriate the rents of the house to that purpose. She now affects to ignore all that has been done since her appointment, and professes not to remember having executed the several instruments which must have been executed by her for the sale of the house and the surrender of the policies, or the receipt of moneys arising therefrom. With regret and under a painful sense of duty, I am bound to say that I do not credit her testimony. True it is that the defendant Gould is a solicitor, and that he was appointed a trustee for that very reason. True no doubt, also, that the legal business was managed by him, and I do not propose to absolve him from any responsibility attaching to him on that ground; but I do not myself think that Byrne J. or any other judge ever intended to hold that a man is bound to indemnify his co-trustee against loss merely because he was a solicitor, when that co-trustee was an active participator in the breach of trust complained of, and is not proved to have participated merely in consequence of the advice and control of the solicitor. I say this without reference to the question whether either of the trustees personally benefited by the breach of trust, because at present I am judicially ignorant how in fact the funds were disposed of. It is, nevertheless, a reasonable inference, according to the facts before me, that Miss Head did not fail to derive a benefit, whatever Gould may have done.

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(1) [1897] 1 Ch. 536.

(2) 25 L. J. (Ch.) 697.

We may now approach the question of the liability of the former trustees, the defendants Houlditch and Clapp. It obviously divides itself into two parts entirely distinct in point of law and connected only by some facts common to both. Again, it is beyond dispute that a breach of trust was committed. It may be said that the application of 1500*l.*, part of the trust property, in discharging Mrs. Head's debt to Jerred, was of itself a breach of trust; but what is complained of is the advance of that sum on the security of policies of insurance and the life interest of Mrs. Head in the trust property. That this was not justified by the terms of the settlements is abundantly clear, and unless it can be defended on other grounds the trustees must account for this 1500*l.* as having been received by them and improperly applied. Any discharge which they can establish will necessarily come out on taking the accounts, and they will still have an opportunity of establishing any not negatived by this judgment; but, so far as points have been argued on facts not requiring further investigation, it is desirable in the interest of all parties concerned that I should dispose of them once for all.

As already noticed, the policies have been surrendered, and the property which yielded the income intended to maintain those policies has been disposed of; and it is urged that Messrs. Houlditch and Clapp cannot now in fairness be made liable for the 1500*l.* when the security for that sum which, on making the sum good, they would be entitled to have transferred to themselves is beyond reach. For this reference is made to *In re Salmon* (1), and it is urged that the equity in favour of trustees, which was the ground of my decision, is not affected by the judgment of the Court of Appeal, depending as it did on the fact that the investment in question in that case was of an authorized character. Certainly Cotton and Fry L.JJ. based their judgments on this fact and did not express any disagreement with my views if applied to unauthorized securities; and if that were all I should deem myself at liberty to apply those views to the present case.

But can it be said that the equity just referred to can properly be invoked to relieve a trustee as against one who has never assented to the improper investment or done anything to put it out of the power of the trustee to obtain the benefit of such investment if he makes the loss good to the trust estate? The plaintiff is an infant and has been incompetent to do one or the other. Put the case somewhat differently. As against a trustee who, on the accounts being taken, is shewn to have improperly applied part of the trust estate, the right of a cestui que trust is to have those accounts set straight—that is, to compel the trustee to pay such a sum as will make them balance. Can it be an answer to his demand to say that some other persons or some other trustees have been parties to dealings with the trust estate which make it inequitable to enforce the claim? I am not deciding any point between the former trustees and other persons, but I hold that as against the infant plaintiff they are bound to make good so much of the trust property as appears on taking the accounts to have been improperly applied by them.

Before passing on to the other charge against Messrs. Houlditch and Clapp, I may conveniently notice their request for directions that on taking their accounts they be allowed sums applied for the benefit of the infant plaintiff. I think that Mr. Lawrence was right in insisting that no opinion should now be expressed on the question what ought to be allowed, but that this question should remain open on further consideration. I will however direct an inquiry couched in appropriate but wide terms intended to bring out on the face of the certificate what (if any) sums have been from time to time applied by Messrs. Houlditch and Clapp, or either of them, for the benefit of the plaintiff. I pointed out during the argument that it was necessary to limit the inquiry to moneys applied by the trustees (which would of course include applications by their agents) so as to avoid any inference that money paid to Mrs. or Miss Head, though intended for the benefit of the plaintiff, would, without more, be regarded as attributable to the plaintiff's share of the estate. While on this subject I may as well mention that it will be right to extend this inquiry, or rather to make a like inquiry respecting applications by the present trustees. This was not asked for and I do not know that it is likely to prove useful, but the direction may as well be given.

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(1) 42 Ch. D. 351.

This brings me to the large and important question whether Messrs. Houlditch and Clapp can be held responsible for the breach of trust committed by the present trustees in selling the house, surrendering the policies, and spending, it matters not how, the produce of the two transactions. To the parties concerned the question is both large and important. As regards those not concerned in the particular case the amount involved is immaterial, but the alleged liability of the former trustees is of vast importance, affecting, as it does, not only the two large classes to one or both of which most men belong, trustees and cestuis que trust, but also all members of the legal profession to which the position and duties of trustees are a source of constant anxiety. The case made against Messrs. Houlditch and Clapp may be thus fairly stated. "You had exhausted all the trust property except this house at Seaton and the policies. You knew that this remaining property was barely sufficient to provide the plaintiff's portion, even assuming that the policies were maintained; and you further knew that the income derived from the house was not more than sufficient to maintain those policies. You were urgently pressed to make further advances to Mrs. and Miss Head, and you asserted with perfect truth that no further advances could properly be made, that is to say, could not be made at all without a breach of trust far more serious in fact and in its consequences than any that had yet been committed. In order to relieve yourselves and to indirectly assist Mrs. and Miss Head you suggested, or if you did not suggest assented to, the appointment of new trustees who you knew would be more accommodating, and contemplated, if they did not actually intend, that which you had properly declined to do." I have no doubt that if this charge can be regarded as proved against Messrs. Houlditch and Clapp the responsibility insisted on must follow, and that they must be held liable to make good the loss to the trust estate occasioned by the breach of trust which they did not themselves commit. This doctrine, to the authorities in support of which I will presently refer, is based, according to a passage in Lewin on Trusts (9th ed. page 752) on agency, and the retiring trustee is treated as actually doing what he does not do in person, because his successor is treated as his agent for this purpose. This view is also taken by Stuart V.-C. in one of the cases to which I have to refer. Far be it from me to say that it is not a sound and satisfactory view, but I venture to think that a different and equally satisfactory explanation of the doctrine can be given. It is the duty of trustees to protect the funds intrusted to their care, and to distribute those funds themselves or hand them over to their successors intact, that is, properly invested and without diminution, according to the terms of the mandate contained in the instrument of trust. This duty is imposed on them as long as they remain trustees and must be their guide in every act done by them as trustees. On retiring from the trust and passing on the trust estate to their successors —and this whether they appoint those successors or merely assign the property to the nominees of those who have the power of appointment—they are acting as trustees, and it is equally incumbent on them in this ultimate act of office to fulfil the duty imposed on them as at any other time. If therefore they neglect that duty and part with the property without due regard to it, they remain liable and will be held by the Court responsible for the consequences properly traceable to that neglect. This explanation will, I think, be found consistent with all judicial utterances on the subject, and haply aid to make them consistent with themselves.

It is strange that so little authority should be forthcoming on a point of such importance, and especially as no one presumes to cast a doubt on the doctrine, which may be regarded as an integral part of accepted legal lore. In former days, when students learned law and practice not only by reading books and attending lectures (means, of course, which cannot be safely neglected), but at least equally as much from the precept and example of a master and animated discussion in the pupil room, doctrines such as this not calling for frequent practical application were passed from one generation to another, and became engrained in the minds of practitioners without being formulated in reported cases unless a precise question was raised between litigants in a concrete form. This possibly explains why, for a doctrine in substance undisputed, there is so little authority to be found. It is right that I should say a word on the few cases cited, which are admitted to be all that can be discovered in the books.

The case of *Webster* v. *Le Hunt* (1) is of material use only by reason of a general statement of law by the Lord Chancellor (Lord Westbury). The judgment of Kindersley V.-C. may be regarded as valuable in applying the law to the particular facts before him, but it is to be observed that his judgment proceeded on the basis of an affidavit which had not been answered; and bearing in mind that this affidavit was entirely disbelieved by the Lord Chancellor who reversed the decision of the Court below, it would be dangerous to quote the judgment as illustrating any principle. One must, however, note the language of the Lord Chancellor, which is expressed by him to be in agreement with the judge whom he was overruling. This is the passage in the report: "Trustees denuding themselves of trust funds, if they did so under circumstances that warranted any reasonable belief of the insecurity of the trust funds in the hands of those to whom they committed them, should not be considered in this Court as having validly discharged themselves of the custody of the trust funds, or released themselves from responsibility. About the principle of the Court there could be no doubt."

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(1) 8 W. R. 534; 9 W. R. 918.

The next case in order of date is *Palairet* v. *Carew* (1), which would not at all be relevant to the matter in hand but for the observations of Lord Romilly. (2) Having noticed that the defendant declined to accede to a certain request on the ground that if a trustee surrendered up a trust to a person who committed a breach of trust, he might be made liable for the consequences arising from the misconduct of the new trustee, he adds: "That, no doubt, is correct to this extent:—If a trustee be called upon to commit a breach of trust and refuses, and his cestuis que trust say, 'There is A. B. who will; will you resign and surrender your trust to him?' and the old trustee accede to that proposal, and transfers the property to the new trustee, for the purpose of enabling him to commit a breach of trust, in that case the old trustee would probably be visited very severely by the Court."

The only remaining case is *Clark* v. *Hoskins* (3), reported before Stuart V.-C. and before the Lords Justices. (4) This is a more useful case with reference to the one in hand, because, as will be seen, there are passages in the judgments more nearly approaching to it; but it is to be observed that what was there charged against the trustees both past and present was deliberate fraud in the suppression of a document, and this goes to the foundation of the decision of the Vice-Chancellor, and makes the facts of that case unworthy of detailed examination here. The Vice-Chancellor laid down the law as follows (5): "Where a trustee, intrusted with property for the benefit of others, resigns the trusteeship after he has been requested to deal improperly with the property, and after he has refused to comply with that request, because he knew that to have acceded

(1) 32 Beav. 564.
(2) Ibid. 567, 568.
(3) 36 L. J. (Ch.) 689.
(4) 37 L. J. (Ch.) 561.
(5) 36 L. J. (Ch.) 692.

KEKEWICH J.

1898

HEAD v. GOULD.

to it would have been to commit a breach of trust, he is placed in a position of the gravest peril"; and he gives as the reason for this, that already mentioned to be stated in Lewin on Trusts. The Vice-Chancellor decided against the former trustees, but the Lords Justices reversed him, and it is their statement, or rather the statement of Lord Hatherley (then Wood L.J.), who delivered the judgment of the Court, of the reasons for their conclusions which has a direct application to the present case. He notices the charge (1), and says that the former trustees were charged with complicity in the scheme and advice that trustees should be found who would hand over the deeds to the defendant Hester Brown, in order to enable her to perpetrate the fraud by suppressing the settlement and obtaining money on the property as if unaffected by the settlement. He says that that was entirely denied by the former trustees, and then proceeds to inquire whether the denial is well founded. I conclude from the language of the Lord Justice that he did not consider the former trustees to have acted wisely or prudently, but he takes special care to point out that he is dealing with questions of a different character. On p. 566 he speaks of them as acting unadvisedly in retiring from the trust and letting some other more accommodating trustees raise the money which was required in their place, but he adds that this had no similarity to the fraud which had been perpetrated. The little which I have said about the case will make intelligible the passage which follows these observations containing the gist of the decision: "These new trustees so appointed might do that which was very improper, and raise for her purposes moneys which they were not entitled to raise, and give receipts to the intended mortgagees; but at the same time these trustees were not asked to assist in committing this fraud; and I conceive it would go far beyond anything which has been ever done in this Court to fix these gentlemen with the consequences, when it was not in their contemplation that such a fraud was to be perpetrated, but it was in their contemplation simply that a sum was to be raised as against cestuis que trust which it would be improper for the trustees in the execution of their duty to raise."

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(1) 37 L. J. (Ch.) 567.

These being the authorities to guide me, it will be as well first to inquire whether Messrs. Houlditch and Clapp can be brought within Lord Westbury's rule. Did they denude themselves of the trust funds under circumstances that warranted any reasonable belief of the insecurity of the trust funds in the hands of those to whom they committed them? Messrs. Houlditch and Clapp were anxious to be relieved of the trust. That can surprise no one who has studied even slightly the facts of this case, and no possible objection could be taken to their retirement if it was properly effected. I do not see what they could do towards that end but appoint, or concur in the appointment of, new trustees in their place. There was nothing on which they could properly apply to the Court, and at that time the appointment of a judicial trustee was unknown. There was of course great difficulty in finding new trustees, and this is a cogent factor in the solution of the question whether the appointment of G. D. Gould and Miss Head was justifiable. They ought to have avoided the appointment of Miss Head if possible, not merely because she was a beneficiary, but because she was known to be under the influence of her mother, and mainly perhaps, and to some extent certainly, by reason of that influence she had taken an active part in the importunities which had already led to a breach of trust, and in that breach of trust itself. But was it possible? They succeeded in finding, or rather Mrs. Head found, a gentleman who was a solicitor ready to undertake the trust out of kindness to the family to which he seems to have owed a debt of gratitude, and although their inquiries respecting him were perhaps somewhat slight having regard to the serious position of the trust, I cannot say that they were not reasonably justified in approving him. It is urged that they could not completely discharge themselves without appointing two competent trustees. That may be admitted, but I cannot hold Miss Head to have been an incompetent trustee when linked with another whose professional position was of itself a security that the trust funds would be properly administered. I cannot blame Messrs. Houlditch and Clapp for the appointment which they made, nor do I think that they had any reasonable ground for believing, or that they believed, that the trust would be otherwise than secure in the hands of their successors. One suspicious fact however deserves special notice. There was in the hands of Messrs. Houlditch and Clapp a small balance of 10*l*. 6*s*. 7*d*. which ought to have been invested or applied in payment of costs or in some other manner conformable to the trusts of the settlement. At the request of G. D. Gould they used this sum to meet the urgent necessities of Mrs. Head. That of course was wrong, and the sum must be charged against them in taking the trust accounts. But it would, I think, be giving this fact far too great weight if it induced me to say that from Mr. Gould's request, made under such circumstances as I have mentioned, the trustees ought to have concluded that he was likely to apply, or contemplated applying, the rest of the trust property in like manner.

As regards the rule laid down by the Master of the Rolls in *Palairet* v. *Carew* (1), and supported, I think, by both judgments in *Clark* v. *Hoskins* (2), the case is still clearer in favour of Messrs. Houlditch and Clapp. What their successors did was to convert the whole remaining trust property and improperly to spend it. They knew that G. D. Gould was reflecting on some possible mode of assisting Mrs. Head, and he had told them, by his letter to Mr. Clapp of November 2, 1894, that he was turning his attention to some means of doing this; but apparently he was as conscious as Messrs. Houlditch & Clapp themselves of the difficulty of doing this, and he certainly never hinted at doing it in the manner ultimately adopted. On reflective study of the evidence and correspondence, and notwithstanding suspicious criticism of some unhappy expressions in Mr. Clapp's letters, I do not believe that Messrs. Houlditch and Clapp contemplated any breach of trust at all, and I am convinced that they never contemplated that actually committed. With the judgment of the Court of Appeal in *Clark* v. *Hoskins* (2) before us it is easy to understand the Master of the Rolls as meaning what he probably intended to express—that in order to make a retiring trustee liable for a breach of trust committed by his successor you must shew, and shew clearly, that the very breach of trust which was in fact committed was not merely the outcome of the retirement and new appointment, but was contemplated by the former trustee when such retirement and appointment took place. That is clearly the doctrine of *Clark* v. *Hoskins*. (1) It will not suffice to prove that the former trustees rendered easy or even intended, a breach of trust, if it was not in fact committed. They must be proved to have been guilty as accessories before the fact of the impropriety actually perpetrated.

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(1) 32 Beav. 564.

(2) 36 L. J. (Ch.) 689; 37 L. J. (Ch.) 561.

There are two third-party notices, one of which, Miss Head's, has been already disposed of, and on that there will be no order. The other is that of Messrs. Houlditch and Clapp. So far as it relates to their alleged responsibility for the acts of their successors, it falls to the ground; but it relates also to their own breach of trust concerning the 1500*l.* against which they claim to be indemnified by Mrs. and Miss Head under the deed of December 8, 1893. To this they are clearly entitled; and if there should eventually be anything coming to either Mrs. or Miss Head out of the trust property it must be impounded to answer this indemnity, which of course will cover costs. It would be useless now to give detailed directions on this subject, but a declaration of right should be inserted in the judgment.

Costs must now be dealt with. It is plain that, but for the breach of trust of the present trustees G. D. Gould and Miss Head, this action would never have been commenced, and they must be ordered to pay the plaintiff's costs up to and including trial. There will be no order now respecting the costs of the former trustees, Houlditch and Clapp, which must wait for further consideration. Whether I shall be able to allow them any costs out of any fund recovered is questionable, and it may be my duty to order them to pay some costs. But while intending to preserve an open mind, I desire to approach this question, when ripe for decision, kindly. These gentlemen committed a breach of trust, and in the eye of the law they cannot be said to have acted reasonably, but they yielded to the importunity of two ladies backed by an appeal for assistance from the son of the one and the brother of the other, and representations that the required advances were needed, not so much to aid a struggle as to ensure comfort and a good position. And now they are attacked in the name of the infant plaintiff, whose interests must of course be protected even as against the trustees, but really, I have no doubt, at the instigation of those whom they honestly though unwisely endeavoured to assist. Their liability ought not to be pushed beyond the limit which the law imperatively demands. On the subject of costs there is no more to be said on the present occasion.

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(1) 36 L. J. (Ch.) 689; 37 L. J. (Ch.) 561.

It had occurred to me to frame minutes of judgment, but having dealt with every point requiring to be noticed I may safely and properly leave the formal details in other hands, though, of course, I am ready to assist for that purpose or hear any suggestion or discussion. It is reasonably clear from the materials before me that the utmost practical result of the litigation will be to secure the plaintiff's share under the settlements, the other beneficiaries having apparently been paid in full. Nevertheless, the judgment must in form be for the execution of the trusts of the settlements generally, and for the ascertainment, by proper inquiries and accounts, of all the parties interested and their respective interests; and although I have found it convenient to speak of the settlements as if there were only one, the distinction between the two of 1865 and 1868 must be maintained, and the judgment must proceed on that footing.

Solicitors: *Dangerfield, Blythe & Hodgson; Gibbs, White & Strong.*

G. I. F. C.

KEKEWICH J.

1898

June 11.

WADE *v.* WADE.

[1882 W. 1267.]

Estate Duty—Incidence—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 14, *sub-s.* 1 *—Specific Sum payable out of Policy Moneys.*

Sect. 14, sub-s. 1, of the Finance Act, 1894, has no reference to the incidence of the estate duty, but is intended for the protection of the executor or other person who is called upon to pay the duty, by giving him a right to recoupment.

The holder of a policy of assurance on his own life for 5000*l.* by his marriage settlement assigned the policy to trustees upon trust to raise at his death 4000*l.* to be held on certain trusts, and as to the remaining part of the policy moneys in trust to pay the same to his executors :—

Held, that s. 14, sub-s. 1, of the Finance Act, 1894, was not applicable, and that the estate duty on the fund must be borne by the part remaining after payment of the 4000*l.*

PETITION.

In the year 1840 the defendant Robert Craven Wade took out a policy of assurance on his own life for the sum of 5000*l.* in the Guardian Assurance Company.

By an indenture dated August 11, 1858, made on the occasion of the marriage of R. C. Wade, the policy and all bonuses and additions thereto were assigned to the plaintiffs in trust, after the solemnization of the marriage, as to the sum of 4000*l.* to be raised on the death of R. C. Wade out of the moneys received on the policy upon trusts in favour of the wife of R. C. Wade during her life and afterwards of their children, and as to the remaining part, over and above the said sum of 4000*l.*, of the moneys received on the policy, in trust to pay the same to the executors of R. C. Wade as part of his estate.

On July 7, 1864, R. C. Wade by deed assigned his interest in the policy to trustees upon certain trusts.

This action was brought for the purpose of carrying into effect the trusts of the indenture of August 11, 1858, relating to the policy, and making provision for keeping the policy on foot, and an order, dated July 17, 1883, was made in the action that the policy should be sold, and the moneys to arise by the sale paid into court to the credit of the action.

The policy was accordingly sold, and the proceeds paid into court, and they were now represented by a sum of 4496*l.* Consols and 29*l.* cash.

R. C. Wade died on April 6, 1898.

No part of the estate duty which became payable upon the death of R. C. Wade had been paid.

This was a petition by the parties interested under the deed of 1858 for the payment and division of the fund, whereby it was (inter alia) prayed that the Consols might be sold, and that out of the moneys to arise by such sale, and the 29*l.* cash, the costs and the amount of the estate duty might be paid in the first instance, and that out of the residue of such moneys 4000*l.* might be paid to the existing trustees of the indenture of August 11, 1858, and the residue to the trustees under the assignment of July 7, 1864. (1)

The petition was served on the trustees of the deed of July 7, 1864.

Warrington Q.C., and *G. B. Hamilton*, for the petitioners. Sect. 14, sub-s. 1, of the Finance Act, 1894, has no application to the present case. That enactment does not affect the incidence of estate duty in any way. Its object was to protect the person who is called upon to pay the duty, and to give him a right of recoupment as against the persons beneficially interested in the property in respect of which the duty is paid: see *In re Bourne.* (2) There is here a charge in form, because there is a direction to raise the 4000*l.*; but in substance there is a trust of a specific sum of 4000*l.* under an express contract entered into by R. C. Wade, and his executors could not be entitled to anything until the 4000*l.* was paid. The case of

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(1) By the Finance Act, 1894, s. 14, sub-s. 1, "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorized or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as annuity or otherwise), under a disposition not containing any express provision to the contrary."

(2) [1893] 1 Ch. 188.

In re Countess of Orford (1) was not decided under s. 14 of the Act, but under previous sections relating to land, and s. 14 was only referred to incidentally. *In re Shaw* (2) was a case of successive appointments of a fund, and it was held that as the burden of the account duty under the Customs and Inland Revenue Act, 1881, was imposed upon the whole fund, each share must bear its own proportion. The result is that no part of the estate duty ought to be thrown on the 4000*l.*, and that the prayer of the petition is right.

Medd, for the respondents, the trustees of the deed of July 7, 1864. The case is clearly within the provisions of s. 14, sub-s. 1, of the Finance Act, 1894. This sum of 4000*l.* is a sum "charged on property," namely, the policy moneys, "under a disposition," namely, the deed of August 11, 1858, "not containing any express provision to the contrary." The cases cited are consistent with this view, and shew that the duty ought to be borne by the 4000*l.* and the residue of the fund rateably. It is submitted, therefore, that the proper order will be that the 4000*l.* be paid to the petitioners subject to duty.

KEKEWICH J. In my opinion it was not intended by s. 14 of the Finance Act, 1894, to provide for the incidence of estate duty. The section was intended as a protection to the executor or other person who, as between himself and the revenue, has been called upon to pay the duty, has paid it, and looks for recoupment. In the absence of a statutory provision he might not be entitled to recoupment, and so the Legislature has provided that he, having been required to pay, may recover a rateable part of the duty from the person entitled to any sum charged on the property in respect of which the duty has been paid. That provision enables him to go against the property for the purpose of obtaining recoupment, but it does not say that contracts are to be interfered with in any way. It leaves them to take effect according to the ordinary rules of law and construction. In this case there was a contract by deed providing that a sum of 4000*l.* should be paid out of policy moneys to certain persons who were entitled to receive that sum.

(1) [1896] 1 Ch. 257.

(2) [1895] 1 Ch. 343.

KEKEWICH J.

1898

WADE v. WADE.

The trustees were to raise on the death of the assured a sum of 4000*l.* to be held on certain trusts, and were to pay the remaining part of the policy moneys, over and above the 4000*l.*, to the executors of the assured. The intention of the deed would be defeated if, instead of the trustees taking out of the policy moneys the sum of 4000*l.*, they were to take only the sum of 4000*l.* less by the proportionate amount of the duty. It was competent to the Legislature to impose such a tax, but the question is whether it has done so. I think that the contract into which R. C. Wade entered having been for payment of a sum of 4000*l.*, that sum ought to be provided accordingly, and that therefore the whole amount of the estate duty must come out of the moneys remaining after the 4000*l.* has been paid. The order must therefore be made in accordance with the prayer of the petition.

Solicitors: *H. B. Wade; Maples, Teesdale & Co.*

C. C. M. D.

ROMER J.
1898
June 9, 14.

In re HAGGENMACHER'S PATENTS.

Patent—Petition for Revocation—Evidence as to prior User—Admissibility of Evidence.

An action for infringement of the patent the subject of this petition, brought by the respondent to the present petition, having failed, the Court being satisfied that the invention had been used prior to the date of the patent at one place out of several referred to, this petition was brought to have the patent declared void, the petitioner relying solely on the instance which had satisfied the Court in the prior action.

A witness on the part of the petitioner stated that he had seen the invention used at the particular place relied on, and in cross-examination he stated that he had seen it used also at other places referred to prior to the date of the patent.

The respondent asked to be allowed to adduce evidence as to the prior user at such other places:—

Held, that the evidence was inadmissible on the ground that if admitted it would be allowing the respondent to go into matters not relevant to the question at issue for the sole purpose of discrediting the witness and disproving the answers to questions put to him on cross-examination.

Petition for revocation of a patent.

In an action for infringement of the patent in question brought by the respondent to this petition, it was contended on behalf of the defendants to the action that the patent was bad, on the ground that it had been anticipated by the invention the subject of the patent having been published before the date of the patent on several occasions at several places, and evidence was gone into at the trial to shew what had been done on those several occasions. The action failed, the Court holding that at one place called Meewith Mill it was satisfied the invention had been used previously to the date of the patent.

The present applicant brought this petition to have the patent declared void, relying solely on the instance in which it had been proved to the satisfaction of the Court in the former action that the invention had been used prior to the date of the patent.

A witness for the petitioner, one Ritchie, deposed that he had used the invention at Meewith Mill, being the case on which the petitioner solely relied, and in cross-examination he stated that he had used it, or seen it used, prior to the date of the patent, on other occasions, being some of those referred to in the prior action.

The respondent thereupon asked to be allowed to go into evidence with respect to the users deposed to by Ritchie other than the user on which the petitioner relied.

Neville, Q.C., *T. Terrell, Q.C.*, and *Micklem*, for the petitioner. The evidence the respondent desires to go into is not relevant to the matter in issue. The sole result of the evidence would be to contradict the witness upon points which have no bearing on the question to be tried, but are collateral matters, and we submit that the evidence is inadmissible. [They referred to *Attorney-General* v. *Hitchcock* (1); *Holcombe* v. *Hewson* (2); *Hollingham* v. *Head.* (3)]

Moulton, Q.C., *Bousfield, Q.C.*, *Walter*, and *J. H. Gray*, for the respondent. The evidence we tender is admissible and relevant. The witness says he used the invention at Meewith Mill, and that he had seen it used prior to the date of the patent at the other places referred to. The respondent is entitled to adduce evidence to shew that the invention was never used at those places. If the witness is wrong in what he says about the user at those places, it is more than likely that what he says as to the user at Meewith is contrary to the fact. The evidence is therefore relevant to the issue before the Court.

ROMER J. When this matter was before the Court previously, it appears that it was suggested on behalf of the defendants, in the action that was then brought by the present respondent, that the respondent's patent was bad because it had been anticipated by the invention being published before the date of the patent at several places; and evidence was gone into at the trial to shew what had been done on those several occasions on which it was said the invention had been

(1) (1847) 1 Ex. 91.

(2) (1810) 2 Camp. 391.

(3) (1858) 27 L. J. (C.P.) 241.

previously used. The respondent's action failed, the Court being satisfied that the invention had been used previously to the date of the patent at Meewith Mill. Then the present applicant brings this petition to have the patent declared void, and he limits his proof to what he thinks is a clear case—the instance in which it was proved to the satisfaction of the Court in the prior action that the invention had been used previously to the date of the patent.

Now, in the first place, is the petitioner wrong in doing that—is it improper? I think the answer must be, No. He was in no sense bound because there were other instances which he might have gone into of prior user which would have given rise to a great deal of evidence, and possibly conflicting evidence, to go into those cases. He was entitled, as it appears to me, to confine his case, as he has done, to the one issue on which, as I have said, his case was clear. Accordingly, on this petition he confines his ground for asking to have the patent revoked to one instance in which, as he says, he can conclusively prove the invention was used prior to the date of the patent. Accordingly, three witnesses are called to prove the existence of the user at Meewith Mill of this invention prior to the patent.

That being the sole issue on this petition, I ask, in the first place, would the petitioner have been allowed before me, in order to support that case, to have given evidence in chief as to any of the users on the other occasions on which it is said this invention had been used prior to the date of the patent? The answer is, I think, Certainly not. It would have been irrelevant to inquire into them, and I should not have permitted it even if the petitioner had desired to do so, because it would have been irrelevant to the issue before me.

Then the respondent cross-examines one witness, and a very important witness, who says he used this invention at Meewith Mill, the case on which the petitioner solely relies. He was asked how he came to use it, and whether it had not been used on other occasions to his knowledge, and he said, Yes; and then he stated that he had used it or seen it used on the other occasions which are referred to, some of which were referred to in the prior action. The respondent now asks me to allow him to go into evidence respecting these users other than that which forms the sole ground of this petition. It appears to me I ought not to allow evidence to be gone into as to those alleged users on other occasions. See what would happen. If I allow the respondent to give evidence in order to shew that the story given by the witness about those other occasions was untrue, I ought to allow the petitioner to call evidence to support his story, and I should therefore be compelling the petitioner to go into those other cases, which the respondent seeks to go into, not for the purpose of establishing as a matter of fact that this invention had been used on those other occasions, because that is irrelevant, but solely for the purpose of discrediting the story told by the witness and of disproving the answers to some questions he was asked on cross-examination which are not matters relevant to the issue I have to try, but are collateral matters. That, it appears to me, would be allowing the respondent to go into evidence on matters not directly in issue, and therefore I ought not to permit it. Test it in this way. What would be the result of going into this other evidence? Suppose I came to the conclusion that the other evidence established that the invention had not been used at these other mills, then the sole result would be that I should say the witness Ritchie was wrong in that—wrong in stating how he came to use this invention at Meewith Mill; and therefore I might say, having found him wrong in that, that I disbelieved his evidence. But it might well be quite true, notwithstanding he was wrong in those other respects, that what he said took place at Meewith Mill did take place, and I might still believe the other two witnesses who have given evidence in support of the petitioner's case, and say that their evidence quite satisfied me that they are right as to what took place at Meewith Mill. The sole effect of that other evidence might be to make me say that Ritchie was wrong as to certain questions he answered which did not concern what took place at Meewith Mill. You cannot ask the Court, upon the question as to what took place on a particular occasion, to embark on the consideration of evidence which only tends after all to shew the probability as to what happened on a particular day; still less can you ask the Court to embark on an investigation of this kind, the sole result of which would be to contradict one witness in his evidence upon points that have no direct bearing, in my opinion, on the question to be tried.

For these reasons, I hold that the evidence which has been tendered for the purpose I have mentioned ought not to be received.

Solicitors: *Sharpe, Parker, Pritchards & Barham, for Alsop, Stevens, Harvey & Crooks, Liverpool; Rehders & Higgs.*

G. M.

ISAACS *v.* TOWELL.

BYRNE J.

1898

April 26, 27.

[1896 I. 1974.]

Vendor and Purchaser—Conditions of Sale—Power to Rescind—Effect of Commencing Litigation—Costs.

Property was sold under conditions of sale empowering the vendor by notice to rescind the sale if any objection should be insisted on which the vendor should be unable to remove, "notwithstanding any intermediate negotiation," and that on rescission the purchaser should be entitled to receive back his deposit without interest or costs. The condition was silent as to intermediate litigation. The purchaser insisted on an objection that the particulars misrepresented that the property was freehold, and that the title shewn was only to a term under an underlease; and on this ground he commenced an action on November 30, 1896, for rescission of the contract, return of his deposit, and payment of the expenses of investigating the title.

Before further proceedings were taken the vendor, on December 4, 1896, gave the purchaser notice of the rescission of the contract, and offered to repay the deposit. On the evidence it was held that the misrepresentation was not made out:—

Held, that the notice was in time, and that the purchaser was only entitled to a return of his deposit without interest, and to the costs of the action up to the time of the receipt of the notice to rescind, and that he must pay the defendant's costs as from that date.

This action was commenced by writ of summons dated November 30, 1896, the plaintiff A. L. Isaacs claiming rescission, delivery up, and cancellation of an agreement dated October 29, 1896, for the sale to him by the defendant W. F. Towell of a house in Westminster Bridge Road; repayment of the deposit paid in respect of the purchase-money, with interest; and payment of the costs, charges, and expenses of and incidental to the investigation of the title.

The agreement was signed on the property being purchased by the plaintiff at a sale by auction, subject to printed conditions of sale. The printed particulars annexed described the property as a "freehold house, No. 46 Westminster Bridge Road," which formed Lot 1 at the sale. Lot 1 was further described in the particulars as "the freehold house and premises, No. 46 Westminster Bridge Road," and after describing the property, the particulars contained the following passage: "Note.—The property comprised in this lot is held on an underlease (at a peppercorn rent), which, if valid, would expire in 1932, but the Superior Lease has been declared void by the House of Lords, and the purchaser will therefore probably acquire an absolute freehold title. (See Condition IV.)."

The condition of sale referred to was, so far as it is material, as follows:—

"4. . . . . The title to Lot 1 shall commence with a conveyance dated 29th April, 1886, which contains a recital of an underlease dated 19th April, 1796, from the assignees in bankruptcy of Charles Gilbert and John Townsend. The title formerly commenced with a lease dated 4th December, 1783, from the Governors, &c., of Magdalen Hospital, to Charles Gilbert, but such lease has been held by the House of Lords to be void, and the parties interested under it entitled in fee. The purchaser of this lot shall not require an abstract of the deeds recited in the conveyance of the 29th April, 1886, except at his own expense in all respects, and shall not make any objection or requisition in respect thereof, and shall admit the identity of the premises as part of those comprised in the lease of 4th December, 1783, and included in the decision of the House of Lords. . . ."

Condition 5 provided (inter alia) as follows: "If any objection or requisition not precluded by these conditions shall be made and insisted on which the vendor shall be unable or (on the score of expense or otherwise) unwilling to remove or comply with, the vendor shall be at liberty, notwithstanding any intermediate negotiation in respect thereof or attempts to remove or comply with the same, by notice in writing to the purchaser by whom such objection or requisition shall be made, or left at the office of his solicitor, to rescind the sale, in which case the purchaser shall receive back his deposit without interest or costs, and shall deliver and hand over the abstract and documents delivered to the purchaser or his solicitor to the vendor's solicitor, but the purchaser may within 7 days after receiving the notice to rescind withdraw the objection or requisition, in which case the notice to rescind shall be deemed to be withdrawn also."

The material requisitions and objections taken, and the answers to them, were as follows:—

"1. The title is altogether defective. The property was sold as 'freehold.' . . . The note expressly refers to condition 4. This condition distinctly points out that the property comprised in Lot 1 must be assumed to be part of the property comprised in a lease of the 4th December, 1783, and it further states as a fact that this lease has been judicially declared void and that the property is now held in fee. It appears from the abstract that in point of fact, the property has, from the date of the root of title, and earlier, been held by way of underlease.

No freehold title whatever is even purported to be disclosed. . . . . If, therefore, this is all the title that the vendor can shew, the purchaser claims to rescind the contract, to recover his deposit, and to be entitled to damages for what, on the face of it, amounts to a serious and apparently unjustifiable misrepresentation."

Answer. ". . . . The title is not defective. The whole description of it given in the particulars must be considered, and then it is only too obvious that it is merely suggested that the title is freehold. . . . . Taking the particulars and conditions as a whole, the true state of the title is sufficiently disclosed. I do not admit that the purchaser . . . . is entitled to rescind the contract."

"2. Condition 4 states that the root of title is a 'conveyance dated 29th April, 1886.' This is absolutely misleading. There is no such 'conveyance' in the well-recognised meaning of the term. The only instrument of that date is an assignment of an underlease."

Answer. "I submit that it is now not at all unusual to term an assignment of leasehold property 'a conveyance.'"

On December 4, 1896, the defendant, in exercise of the power in condition 5, gave notice in writing to the plaintiff rescinding the sale, and informed him at the same time that the auctioneer was instructed to return the deposit. Immediately afterwards defendant entered an appearance in the action.

The plaintiff nevertheless went on with his action, and in his statement of claim claimed relief on the grounds (1.) that defendant had failed to make out a title in accordance with the agreement, and (2.) that the advertisements and particulars and conditions untruly represented that the property sold was freehold. . . .

At the trial Byrne J. was satisfied on the evidence that the alleged case of misrepresentation failed, and that the plaintiff at the time of sale knew there was a question whether the title was freehold. Another point argued was whether under the circumstances the defendant could exercise the power to rescind after action brought.

Eve, Q.C., and *J. M. Gover*, for the plaintiff. A condition giving the vendor power to rescind where requisitions are insisted on does not apply where, as in this case, no title is shewn. That was laid down by Hall V.-C. in *Bowman* v. *Hyland* (1), which was approved by Lindley M.R. in *In re Deighton and Harris's Contract.* (2)

After litigation has been commenced the vendor cannot take advantage of a condition giving him power to rescind if requisitions are insisted on. The 5th condition in the present case does not contain the usual words, "notwithstanding any previous negotiation or litigation." Even where those words were used it was held by the Court of Appeal that the vendor could not, after judgment against him, exercise the power to annul the sale: *In re Arbib and Class's Contract.* (3)

Where the words as to litigation were omitted, the vendor was held entitled to rescind the sale by a notice given on the same day as that on which a bill was filed, but in that case the purchaser was seeking a decree for specific performance: *Hoy* v. *Smythies.* (4) Even where there was power to rescind "notwithstanding litigation," Hall V.-C. held that the power could not be exercised after action brought by the purchaser for the return of his deposit and damages; and on this point the judgment was left undisturbed by the Court of Appeal: *Best* v. *Hamand.* (5)

(1) (1878) 8 Ch. D. 588.
(2) Now reported [1898] 1 Ch. 458.
(3) [1891] 1 Ch. 602.
(4) (1856) 22 Beav. 510.
(5) (1879) 12 Ch. D. 1.

[They also referred to *Woolcott* v. *Peggie.* (1)]

Astbury, Q.C., and *P. F. Wheeler*, for the defendant. The authorities shew that the notice to rescind, being given bonâ fide, was good, and determined the contract. This is not a case of the vendor having no title, like *Bowman* v. *Hyland.* (2) At the outside—that is, even if the vendor had not the freehold—it is more like *In re Deighton and Harris's Contract.* (3)

The vendor is not in a worse position because the condition is silent as to litigation; the only difference is that the condition is wider in its terms. The power may be exercised after the purchaser has commenced proceedings for specific performance, or even after the vendor has done so: Dart on Vendors and Purchasers, 6th ed. p. 179; *Duddell* v. *Simpson.* (4)

[Byrne J. referred to Webster on Conditions of Sale, 2nd ed. p. 342.]

Eve, Q.C., in reply.

[The following cases were also referred to: *In re Banister* (5); *Southcomb* v. *Bishop of Exeter* (6); *Torrance* v. *Bolton* (7); *Price* v. *Macaulay* (8); *Warde* v. *Dixon.* (9)]

Byrne J. (after deciding on the evidence in the defendant's favour on the question of misrepresentation). The purchaser having insisted upon his requisitions, and issued the writ in the present action, the defendant thereupon, before further proceedings were taken, and after a lapse of about three days, elected to rescind, and sent a notice to rescind under condition 5 [which his Lordship read].

It is pointed out that this condition is not in the form which is sometimes used, but omits the words "notwithstanding any intermediate litigation," and the argument was pressed to its full extent, namely, that the absence of those words shews that the condition means that the rescission, if any, under the clause must take place before writ issued on the other side—before the commencement of litigation. I do not think there is any authority for that proposition. There is authority for saying that where the condition does contain the words "notwithstanding any intermediate litigation," that does not allow rescission after litigation has taken place, and judgment has been obtained; that those words are sufficiently answered by the vendor having the right to rescind up to the time of judgment or the decision of the point between the parties. I have been referred to no decision which says that the issue of a writ by the purchaser insisting on his requisition bars the right under a condition worded as this is; and, indeed, I think that the case of *Hoy* v. *Smythies* (1) is really an authority the other way, for in that case the notice to rescind was given two days after the bill was filed, and upon the same day as that which may be considered as the commencement of litigation, when a complete copy of the bill was filed. I think the true view is that you cannot lay down a general rule as to the period at which, after litigation, the vendor can be held disentitled to rely upon a condition of this description. It would indeed be a curious state of things if when a purchaser sent notice of insistence upon a particular requisition, and issued a writ on the same day, he could thereby absolutely preclude the vendor from doing that which he could have done had a sufficient interval been allowed him. I do not say that that was exactly the present case.

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(1) (1889) 15 App. Cas. 42.
(2) 8 Ch. D. 588.
(3) [1898] 1 Ch. 458.
(4) (1866) L. R. 2 Ch. 102.
(5) (1879) 12 Ch. D. 131.
(6) (1847) 6 Hare, 213.
(7) (1872) L. R. 14 Eq. 124.
(8) (1852) 2 D. M. & G. 339.
(9) (1858) 28 L. J. (Ch.) 315.

There is another class of cases to which I must refer. A vendor may, under certain circumstances, exercise his power under a condition of this kind even after he himself has brought an action for specific performance, and in a case of *Warde* v. *Dixon* (2), before Kindersley V.-C., where a suit had been brought on for hearing upon motion for a decree under the old practice, the Vice-Chancellor said (3): "The only other point to which I think it necessary to advert is this. It is suggested by the plaintiff's counsel, that the condition as to the right to rescind, is a condition of which he is entitled to avail himself; and that if the Court would make an order to the effect that there is to be first of all a decree for specific performance, and then a reference as to title in the usual way—having regard to the conditions of sale—he is content not to rescind. But if the Court will not give him that, then that he ought to be entitled to rescind the contract—nay, more, that if he so rescinds, the Court ought to give him the costs of the suit. I confess I am unable to understand how he can claim the latter, even if he could claim the former." Then, after some further observations, he says: "The vendor says, 'I reserve to myself the power of rescinding, because there may be a great deal of difficulty caused by the requisitions. I may find it very inconvenient, or very expensive, and, perhaps, almost impossible, to answer them, or to meet the objections; and therefore, I reserve to myself the power. If I do not, the purchaser may file a bill against me; I may be dragged into equity, or I may have an action brought against me for non-performance of the contract; and therefore I reserve to myself the power of rescinding the contract, that I may not be exposed to such a result.' The plaintiff, however, says, 'I know I may rescind the contract if I like, but I will not rescind the contract; and so far from objecting to being dragged into equity at all, I will myself drag the purchaser in. I will file my bill, and bring the cause to a hearing.' I think I may say this, that if the cause comes to a hearing, the vendor will find it very difficult to satisfy me that he is entitled to ask to rescind the contract. He cannot ask to rescind the contract, and put aside the other proposition as to his being entitled to the costs of the suit. The question is, what he may do in the present state of things? The cause does not come to a hearing except so far as under the new practice a motion for a decree may be said in one sense to bring the cause to a hearing. I think that, under such a condition as this, if a vendor files a bill and afterwards dismisses his bill, he may be—I do not say he is—then entitled to say, 'I will still resort to my condition, and rescind the contract'; but if he is so entitled, he must first dismiss the bill; and how he is to dismiss his bill, except by dismissing it with costs, I really do not know. I think, therefore, he would have to dismiss his bill with costs before he could say he is entitled to rescind the contract.

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(1) 22 Beav. 510. (2) 28 L. J. (Ch.) 315.
(3) 28 L. J. (Ch.) 322.

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Well, in this state of things, I refuse this motion with costs; but I do not mean to express any opinion that when that is done it is not competent to the plaintiff to dismiss his bill with costs, and then rescind the contract. This will leave the cause exactly in the same position in which it was at the time when the notice of motion was given." The Vice-Chancellor, therefore, appears to take this view—that even after motion for decree it was not too late for the vendor to elect to dismiss his bill for specific performance with costs, and still to exercise the power to rescind under such a condition as the present. I agree it is not an absolute decision on that point; but I think that is the meaning and effect of what the Vice-Chancellor says.

Now, having regard to what I have said, is not the true view this—that it is not the mere issue of a writ, the mere commencement of litigation, that takes away the power of a vendor under a condition of this kind? Is it not rather that just as bringing an action for specific performance is in itself evidence, and perhaps strong evidence, of a waiver of the condition, it is nothing more than that: so that if after the writ proceedings have been taken by the defendant, either by putting in a defence or by taking other steps after the issue of the writ, it remains a question whether or not what has been done amounts to a waiver of the right to rescind? The form of condition which is now so often used, putting in the words "notwithstanding any intermediate litigation," prevents any question of that sort from arising. At any rate, in the absence of decision to the contrary, I am not going to lay down any such rule as that the mere commencement of an action, without further proceedings being taken, is sufficient to take away a vendor's right "bonâ fide" to act under such a condition as this. Now, I may say that in the present case I am satisfied there has been perfect "bona fides" on the part of the vendor and those advising him. I think it doubtful whether the auctioneer and the owner were well advised in putting in the word "freehold" after the solicitor had struck it out, but that it was done "bonâ fide" I am perfectly satisfied. The property in the Westminster Bridge Road—I do not mean this particular house, but property depending upon the same title—

has been sold and dealt with, and has been accepted by purchasers as freehold, and has been sold by this very same auctioneer, who has been in the habit of selling it as freehold. I am not going to say one single word which will throw any doubt upon the title of persons who have so purchased. I can readily see that persons might be quite willing to take this property as if it were a freehold title; and I will say no more about it, for I decline to venture, with such knowledge as I have, to make further observations.

Now, if the question of misdescription is out of the way, first of all, was the plaintiff entitled to bring his action to rescind? I think I may assume for the purposes of my decision that he was. I think it is one of those cases where the Court would probably not decree specific performance; it might or might not have done so. The purchaser chose to insist upon his requisition; and the vendor without undue delay elected to act upon the power given him by condition 5. It has been argued that there is no right to act upon a condition of this kind where no title is shewn such as is contemplated by the particulars and conditions of sale. But looking at the particulars and conditions of sale, and reading them and this note fairly, I cannot help seeing that what was meant and intended to be given to the purchaser was a certain leasehold title, with a probable freehold title, and I think that the condition, worded as it is, was a reasonable condition to put in under such circumstances, and meets the very case before me.

Accordingly, I think the defendant was entitled to give his notice to rescind the contract under the condition. Up to the date of his giving that notice to rescind there was a small expense, namely, the cost of the writ, to which I think the plaintiff in the action is entitled, because the proceedings were taken bonâ fide, and that ought to have been paid. The return of the deposit was tendered, and of course refused. I think the plaintiff must have a return of his deposit, and he must pay the subsequent costs.

I ought not to part with the case without dealing with the decision of Hall V.-C. in *Bowman* v. *Hyland* (1), approved as

(1) 8 Ch. D. 588.

it has been quite recently by the high authority of the present Master of the Rolls. But that case really stood on a special footing. The defendants contracted to sell the inheritance in fee simple free from incumbrances of a piece of land, and the balance of the purchase-money was to be paid on February 28, 1877, which was the day fixed for completion of the purchase. In April the conveyance was prepared and engrossed; but before it was executed it was discovered that, instead of having been seised in fee at the date of the contract, the defendants were then only entitled to the residue of a long term of years at a peppercorn rent which expired on March 25, 1877, shortly after which day the persons entitled to the reversion entered and took possession—that is to say, a little more than a month had expired after the date of the contract. When the plaintiff ascertained that this was the case, he objected that the defendants could not make a title. Some fruitless negotiations ensued; and ultimately, on July 14, 1877, the vendors gave the purchaser notice that they annulled the sale under a clause in the contract, and at the same time tendered him his deposit. Hall V.-C. held in that case that a condition of this description is not meant to meet the case where the purchaser has made an objection that the vendor has no title, and that the property belongs to someone else; and, more than that, the Vice-Chancellor held that in the case before him the matter had gone on so long after the time when the vendors' solicitors knew the real position of the case with reference to the title, without any steps being taken, that they had waived the right of rescission under the clause. I do not think that that case covers the present, and I have stated the judgment which I think I ought to give. The plaintiff must pay the defendant's costs after the receipt of the notice to rescind.

Solicitors for plaintiff: *C. & E. Woodroffe.*
Solicitor for defendant: *W. B. Fairbrother.*

F. E.

McLEOD *v.* POWER.

[1896 M. 1837.]

BYRNE J.
1898
June 30.

Practice—Judgment against One of Two Joint Debtors—Effect as regards the Other—Pleading—Costs.

The rule in *King* v. *Hoare*, (1844) 13 M. & W. 494, that a judgment against one of two joint debtors is a bar to proceedings against the other, applies where both joint debtors are originally made defendants to and enter appearance in the same action, and judgment by consent has been obtained against one of them in that action.

The observations of Bowen L.J. in *In re Hodgson*, (1885) 31 Ch. D. 177, 188, followed.

Where one joint debtor has consented to judgment, the other, if he wishes to avail himself of the judgment as a defence, should plead it. A debtor not so pleading was ordered to pay costs up to the time of the consent judgment.

THE writ in this action was issued on July 2, 1896, by A. H. McLeod, plaintiff, against J. Power and H. Perrins, defendants, and the claim was for "2000*l.* principal, and delivery of 24,500 shares in the South African Saltpetre Fields, Limited, or their nominal value in cash, and 100*l.* damages for their detention, or in the alternative . . . . specific performance" of two agreements between the defendants and the plaintiff.

Both defendants entered appearances to the writ.

The statement of claim was delivered on November 14, 1896. In it plaintiff alleged that the defendants were owners of options and other rights over South African properties, and were desirous of forming a company to work the same; and that by certain agreements, in consideration of plaintiff advancing cash and obtaining extensions of time, the defendants agreed to pay him cash and give him shares in the intended company; but that although the company had since been formed the defendants had failed to perform the contracts, and plaintiff claimed payment of the sums, delivery of the shares, and damages, or in the alternative specific performance.

Perrins delivered his statement of defence on January 13, 1897, and Power delivered his defence on January 26, 1897.

On February 24, 1897, Perrins in writing admitted his liability in the action, and consented to judgment being entered against him; and judgment was accordingly by consent given against him on motion for judgment on August 7, 1897, for the recovery of the money and shares, an inquiry as to damages, and costs.

The plaintiff joined issue with Power on July 22, 1897, and the action was afterwards brought on as against him for trial with witnesses. Power at the time of trial had not amended his defence by pleading the judgment obtained against Perrins.

Eve, Q.C., and *H. Spensley, jun.*, for the plaintiff, stated the facts.

Frank Dodd, for the defendant Power. Having obtained judgment against Perrins, one of the joint defendants, in respect of a joint contractual liability, the plaintiff is not entitled to proceed further in the matter: *Kendall* v. *Hamilton.* (1) If the judgment had been by default this defence would not have been available.

[*Eve, Q.C.* In *Kendall* v. *Hamilton* (1) the judgment had been obtained in a previous action.]

That is so, but the ratio decidendi applies, for in each case the joint liability, the one cause of action, is merged in the judgment, and the debt no longer exists.

The principle was laid down in *King* v. *Hoare* (2), and certain exceptions to the rule have been created by the Rules of the Supreme Court.

By Order XIII., r. 4, when the writ is indorsed for a liquidated sum, and one of several defendants fails to appear, final judgment may be entered against him without prejudice to the right to proceed against those who have appeared. And under Order XIV., r. 5, final judgment may be entered against one defendant, who is not given liberty to defend, without prejudice to the right to proceed against another defendant who has obtained liberty to defend.

The provision made by the rules for the two particular cases shews that in other cases the old rule was intended to prevail.

(1) (1879) 4 App. Cas. 504.

(2) 13 M. & W. 494.

[Byrne J. referred to Order xvi., r. 4.]

That is only a rule as to the joinder of parties. [He also referred to *Odell* v. *Cormack*. (1)]

[Byrne J. decided to hear the evidence on behalf of the plaintiff, reserving the point taken on behalf of the defendant Power, who relied on the objection taken by his counsel, and did not call any witness.]

Eve, Q.C., and *H. Spensley, jun.* No case goes the length of saying that this highly technical rule applies where both the joint contractors were originally made defendants to the same action. In each reported case the defence of judgment recovered against one joint contractor has been taken in a subsequent action against the other.

[Byrne J. The observations of Bowen L.J. in *In re Hodgson* (2) refer to the case of an action being "continued against one debtor or all the debtors."]

He is dealing with the case of partnership liability. In *Weall* v. *James* (3) it was held that where joint contractors were sued and one only obtained leave to defend, the other submitting to judgment, the plaintiff could go on with the action against the former, effect being given to Order xiv., r. 5.

[Byrne J. The rules provide specifically for that and another case; but if you cannot bring yourself within the rules the old practice does not seem to protect you.]

Unless it can be shewn that the rule in *King* v. *Hoare* (4) has never been applied where the joint contractors were originally made joint defendants. The rule was held not to apply where two persons guaranteed the payment of rent, and one of them gave a cheque for it which was dishonoured. An unsatisfied judgment on the cheque was held not to be a defence to an action against the other guarantor on the guarantee: *Wegg Prosser* v. *Evans*. (5) Power is not in this case prejudiced by the judgment against Perrins, and the case last referred to shews that the real rule only applies where there is a second action against the joint contractor against whom judgment has not been obtained. *Hammond* v. *Schofield* (1) was another case of a second action being brought, and it was there held that the consent judgment in the former action against one joint contractor could not even with his consent be set aside so as to enable the plaintiff to go against both the joint contractors. But the judgment of Lord Blackburn in *Munster* v. *Cox* (2) shews that where both joint contractors are originally made defendants, the operation of a judgment against one may be nullified as a defence by setting aside all proceedings after appearance.

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(1) (1887) 19 Q. B. D. 223, 228.

(2) 31 Ch. D. 177, 188.

(3) (1893) 68 L. T. 54.

(4) 13 M. & W. 494.

(5) [1895] 1 Q. B. 108.

[On the question of costs they referred to Order XXIV., r. 2.]

Dodd, in reply.

BYRNE J. In this case the plaintiff sues in respect of a claim against joint contractors, and both of the joint contractors are made defendants. Before the case came on for trial, but after defence, judgment was obtained by consent in respect of the cause of action against one only of the defendants.

The question I have to decide is whether the old rule recognised in *Kendall* v. *Hamilton* (3) and in many other cases, and laid down in *King* v. *Hoare* (4), is applicable where the point arises, as it has arisen in the present case, in the same action.

The old rule is stated by Bowen L.J. in *In re Hodgson* (5), and after referring to *Kendall* v. *Hamilton* (3) he says: "It appears to me to be of considerable importance to bear in mind exactly what *Kendall* v. *Hamilton* (3) did and what it did not decide. Now in order to do that, in a few words I should like to consider the rights in equity as distinguished from the rights in law of creditors of a joint debtor. The common law principle that a judgment recovered against a joint debtor is a bar to a further action to be prosecuted against another joint debtor is explained at length in the case of *King* v. *Hoare*. (4) There is in the cases of joint contract and joint debt, as distinguished from the cases of joint and several contract and joint and several debt, only one cause of action. The party injured

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(1) [1891] 1 Q. B. 453.

(2) (1885) 10 App. Cas. 680, 689.

(3) 4 App. Cas. 504.

(4) 13 M. & W. 494.

(5) 31 Ch. D. 177, 188.

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may sue at law all the joint contractors or he may sue one, subject in the latter case to the right of the single defendant to plead in abatement; but whether an action in the case of a joint debt is brought against one debtor or against all the debtors, or continued against one debtor or all the debtors, it is for the same cause of action—there is only one cause of action. This rule, though the advantage or disadvantage of it may have been questioned in times long past, has now passed into the law of this country. I should only wish to observe that whether or no the rule by the light of pure reason and unassisted by authority might or might not have recommended itself to modern minds, the rule is by no means a technical rule. It is based, rightly or wrongly, on the idea that a joint debtor has a right to demand, if he pleases, that he shall be sued at one and the same time with all his co-debtors. To enforce this right he is only entitled to plead in abatement, but the right is one of considerable business value, and is so recognised by the law. In order to protect each of the joint debtors, the law treats the cause of action as being a joint one, and as capable of being merged whenever it is pursued to a judgment. It is absorbed and merged in the judgment which is recovered against one of the debtors, not only as against him but as against all the rest, and the object is to prevent the prejudice which the law conceives might arise to a joint debtor who is not being sued, if he were left with future litigation still hanging over his head."

That is a clear exposition of the law relating to the case, and there are several cases in the books all pointing to this—that the rule is an established rule, and that it would be in vain to attempt at this time of day to argue the point if this were a case of separate actions, instead of one single action brought against both joint contractors. But it is urged that the action having been properly conceived and properly brought, and both of the joint contractors having been sued for the same cause of action, the mere fact of taking judgment by consent against one ought not to prevent the plaintiff taking judgment against the other in the ordinary course at the trial after hearing the evidence. It is clear to my mind that there is nothing in the

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rules which will enable me to draw that distinction. The rules do provide in two cases for what I may term the non-observance of the ordinary rule. If the plaintiff obtains judgment under Order XIV., or if he obtains judgment by reason of default on the part of one of the defendants, in each of those cases the rules expressly provide that he may take advantage of the rules without prejudice to his right to go on against the remaining defendants or defendant. But there is no such rule applicable to what has happened in the present case, and I do not see my way to holding that, because the action was originally rightly conceived, therefore the remaining defendant, after judgment by consent has been obtained against the other, is not entitled to plead and to take advantage of the fact that the debt has merged in the judgment so obtained. It may be that it is a "casus omissus" in the rules, and it may be that when attention is called to the matter it may be remedied in rules hereafter to be made; but in the meantime I feel myself bound to hold that the plaintiff is not entitled to the relief he asks.

Mr. Dodd very fairly and properly admitted that he relied on that point, and that, but for the rule which I have applied, the plaintiff would have been entitled to recover on the evidence so far as it goes. It is clear that the defendant Power ought to have pleaded this matter, so as to give the plaintiff notice that he meant to raise the point at the trial, and although I have not felt at liberty to refuse to allow him to take advantage of it as if it had been already pleaded, I do not think it would be right on my part to order the plaintiff to pay costs which he might have had an opportunity of avoiding—an opportunity which might have saved the expense of bringing him from South Africa had he had notice that the point was to be taken. Under these circumstances, I think the right order is that the defendant Power shall pay the costs of the action up to the time when judgment was obtained against Perrins, but that there ought to be no subsequent costs of either party.

Solicitors for plaintiff: *Ashley Lumby & Michael.*
Solicitors for defendant Power: *Wild & Wild.*

F. E.

BOILEAU *v.* HEATH.

BIGHAM J.

1898

May 19, 20. 23.

[1897 B. 2027.]

Minerals—Chattels—Mounds of Refuse produced in Iron Manufacture.

Plaintiffs demised coal and iron mines to a company, which, in manufacturing iron from ironstone, produced large quantities of refuse (consisting principally of protoxide of iron and silica) called "tap-cinder" or "puddlers' taps." This refuse, which was at the time unsaleable, was thrown on the demised land and accumulated in large mounds. On the determination of the lease plaintiffs demised the land and minerals to defendants, who only worked the coal, and did not add to the mounds. Afterwards defendants purchased the "stores and other effects" on the land from plaintiffs. The tap-cinder in the meantime had acquired a commercial value, and large quantities of it were sold by defendants:—

Held, that plaintiffs were entitled to the mounds and to an account of the proceeds of sale, inasmuch as the mounds, although they might have been removed by the company during its lease, were not chattels passing under the sale of the stores and effects, and were not iron, or ironstone mines, seams, veins, or beds, opened or unopened, or minerals within the meaning of the defendants' lease.

THE plaintiffs were the Norwich Union Life Insurance Society, and its trustees, the owners of the Clough Hall Ironworks and Collieries in the county of Stafford, and for some years before and up to December, 1892, they had leased it to the Kidsgrove Steel, Iron, and Coal Company, Limited, which got into difficulties and was wound up. On December 16, 1892, there being then rent in arrear, the plaintiffs obtained an order of the Court for re-entry, and took possession on that date; and so the lease to the company terminated.

The present action was brought with reference to certain mounds or heaps of mineral refuse lying on the surface of the land and composed of "tap-cinder" or "puddlers' taps." The mounds came into existence during the tenancy of the Kidsgrove Company, and were produced in the course of the ordinary working of the ironstone of the mine. The ironstone was worked as follows: It was first raised from the earth and then calcined by being placed in heaps and fired by means of a mixture of slack, this causing a considerable reduction in the weight. It was after this process that the weight was taken for the purpose of ascertaining the amount of the royalty payable to the landlords. The calcined ore was then liquefied in a blast furnace by means of coal and limestone, the metallic fluid sinking to the bottom and the cinders and other refuse, which floated on the top, being drawn off and cast on spoil heaps as being of no value. These were not the heaps in question. The fluid was drawn off into moulds and formed pig-iron. The pigs were then taken to another part of the works and put into puddling furnaces, and during the process of puddling large quantities of "tap-cinder" were produced, which were drawn off from the furnaces in small wagons and thrown into heaps on the ground, and in course of time made up the mounds now in dispute. This tap-cinder, of which there was said to be about 100,000 tons on the works, consisted chiefly of protoxide of iron and silica. When the plaintiffs re-entered, the mounds were on the ground, and no claim to them was made by the outgoing company.

The plaintiffs, having re-entered, kept the mines going on their own account for a few weeks, and in February, 1893, entered into an agreement for a lease of the premises to the defendants, R. Heath, J. Heath, and A. H. Heath. By this agreement it was provided that the term should be for forty-two years at a minimum rent of 2000*l*. a year, that the royalties should be the same as those payable under the Kidsgrove lease, with the addition of 1*d*. per ton for slack, and that the lease should include all mines from the surface down to and including what was called "the silver mine." It was, however, expressly provided that the defendants should not be bound to work the ironworks, it being expressed to be their intention to remove and dispose of the plant and machinery connected therewith. By an agreement of even date the plaintiffs sold to the defendants the plant and machinery then on the premises for 25,000*l*. The money was duly paid, and the defendants entered into possession on February 1, 1893. They had since worked the mines, but only for coal, and therefore they had not added to the mounds of tap-cinder. The lease was not executed until August 28, 1897, after the commencement of the present action.

Soon after the defendants had entered into possession the plaintiffs put forward a claim for nearly 3000*l*. for tools, stores, and other similar chattels on the premises when the defendants entered, and which it was contended did not pass under the sale of "plant and machinery," and cross-claims were made by the defendants. The claims formed the subject of a settlement, the terms of which were reduced into writing on February 28, 1895. The document was headed "Terms of settlement of matters in dispute," and it provided, inter alia, that the defendants should pay the plaintiffs 1000*l*. in full and final settlement of all their claims "to stores and all other effects upon the premises."

The defendants began to work the mines in March, 1894, and they also sold and allowed to be removed many tons of the tap-cinder, which in the meantime had become marketable.

This action was brought for an injunction to restrain the defendants from dealing with the heaps or mounds of tap-cinder, and for an account of the sales and payment of the proceeds.

At the trial of the action on May 18 and 19, 1898, it was suggested in argument by the defendants' counsel that the mounds passed to the defendants under the above-mentioned settlement; but Bigham J. held that they did not, and that under the circumstances the words "stores and all other effects" only covered the items in the claim then made, and any other items of a similar kind which might have been overlooked.

The principal arguments, as to whether the mounds were chattels or passed to the defendants under their lease, were as follows:—

Warmington, Q.C., *H. Terrell, Q.C.*, and *Younger*, for the plaintiffs. The heaps of refuse slack, called puddlers' taps, are several acres in extent, and amount to 378,000 tons. They do not pass to the defendants under the words "mines and minerals" in their lease: *Scott* v. *Midland Ry. Co.* (1); *Lord Provost of Glasgow* v. *Farie.* (2) They are part of the freehold, not chattels. But if they are chattels, they were never intended to pass and do not pass to the defendants under the settlement.

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(1) (1897) 13 Times L. R. 398.

(2) (1888) 13 App. Cas. 657.

They fall rather within the principle of *Elwes* v. *Brigg Gas Co.* (1), the case of a prehistoric boat found embedded in the soil of land demised to the defendants.

Cozens-Hardy, Q.C., Bray, Q.C., and *Stokes*, for defendants. The mounds are chattels, and have been purchased by us from the plaintiffs, and if they are not our property they certainly do not belong to the plaintiffs. They are the residuum of something on which the former lessees paid royalty. Plaintiffs could not have stopped the former lessees from selling the taps. They were intended to remain as chattels; if not, when did they cease to be chattels? "Perhaps the true rule," says Blackburn J., "is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels": *Holland* v. *Hodgson.* (2) If the mounds are not chattels, they passed to us as minerals under the lease.

H. Terrell, Q.C., in reply. The mounds were not included in the settlement with the defendants. If they were chattels, they were there when defendants took possession, and they cannot set up title to them against their landlords. The term "minerals" has never been held to include anything except that which is part of the natural soil: *Elwes* v. *Brigg Gas Co.* (1)

Cur. adv. vult.

May 23. BIGHAM J. (after a recital of the facts, from which the statement above is derived, and after deciding as already mentioned that the mounds did not come within the words "stores and all other effects"). It was said by the defendants that tap-cinder had always been of some value for road-making and so on, and it was suggested that the heaps were kept separate from the other refuse heaps formed from the blast furnaces—admittedly mere waste—because of the value of the tap-cinder. I am, however, of opinion that the tap-cinder in

(1) (1886) 33 Ch. D. 562.

(2) (1872) L. R. 7 C. P. 328, 335.

the time of the Kidsgrove Company was of no value at all, and that the fact that it was thrown into heaps on a different part of the ground from that occupied by the other refuse heaps was due merely to the circumstance that the blast furnaces where the one kind of refuse was produced were away from the puddling furnaces where the tap-cinder came into existence. There was no proof before me that the Kidsgrove Company ever sold an ounce of tap-cinder, and I cannot help thinking that an insolvent company would have turned an asset of that kind into money if it had been possible to do so. And it is clear that when the liquidator was winding up the company he got nothing for it either from the plaintiffs or from any one else. It was not regarded as an asset, although no doubt it formed part of the products of the mines on which the Kidsgrove Company had paid royalty. The conclusion I come to is that these mounds are not chattels at all. No doubt when the material was first found it would have been competent for the Kidsgrove Company to have treated it as their own, and to have sold it if they could for their own benefit. But they could not sell it and did not want to sell it, and when they piled it on the earth their intention was that it should once more form part of the earth out of which it had been produced, and should no longer be, if ever it was, of the nature of a chattel. These mounds are not chattels, and even if they are, the property in them never, in my opinion, passed to the defendants. By reason of scientific discoveries since the date when the defendants entered into possession of these mines the tap-cinder has become valuable and saleable, and this fact explains the claim which the defendants are now making. It appears that the defendants began to work the mines in March, 1894, and they have already sold about 20,000 tons of the tap-cinder at from 4*s*. to 6*s*. a ton. When the plaintiffs first heard that this was being done, they, or their manager Mr. Lucas, apparently thought that the defendants ought to pay a royalty on the footing of the mounds forming part of the leased mines, and there are some letters in which Mr. Lucas puts forward this view. If, however, the defendants are entitled to work the mounds as being part of the demised premises, I am of opinion that they may do so without paying any royalty. The royalties are payable only in respect of calcined ironstone, coal, slack, and cannel; and tap-cinder is, in my opinion, none of these. But are the defendants entitled under their lease to work the mounds at all? Mr. Cozens-Hardy says they are. His contention is that if the mounds are not chattels, but form part of the soil, they pass to the defendants under the lease, and may be removed by them for their own profit. I do not think this contention is sound. What is leased is, first, the coal, then the ironstone, and then "all mines, seams, veins, and beds, as well opened as unopened, of all other minerals and clay lying and being within and under the lands from the surface down to and including the silver mine." In my opinion this description applies only to what may be called natural formations in and on the land, not to artificial formations such as these mounds. These mounds are not iron or ironstone, nor are they coal, slack, mines, seams, veins, or beds, either opened or unopened, of any other minerals within the meaning of the lease. For these reasons I give judgment for the plaintiffs with costs.

[His Lordship accordingly declared that the defendants were not entitled to the tap-cinder, or puddlers' taps, and were not entitled to remove them; that the plaintiffs were entitled to them; and that the plaintiffs must have an injunction against the defendants to restrain them from removing or selling the taps, and an inquiry as to the taps already removed, and payment of the value thereof.]

Solicitors for plaintiffs: *Hartcup, Davis & Cobbold, for W. T. Hartcup, Norwich.*

Solicitor for defendants: *W Sanders Fiske, for Knight & Sons, Newcastle-under-Lyme.*

F. E.

C. A.

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ROMER J.

June 10.

C. A.

July 6.

BIGGS *v.* HODDINOTT.

[1898 B. 2209.]

HODDINOTT *v.* BIGGS.

[1898 H. 1614.]

Mortgage—Mortgagor and Mortgagee—Continuance of Loan—Redemption—Restrictive Covenant—Collateral Advantage—Injunction.

A mortgagee may stipulate for a collateral advantage at the time and as a term of the advance, provided the equity of redemption is not thereby fettered, and the bargain is a fair and reasonable one, entered into between the parties while on equal terms, without any improper pressure, unfair dealing, or undue influence.

Jennings v. *Ward*, (1705) 2 Vern. 520, explained and distinguished.

Mainland v. *Upjohn*, (1889) 41 Ch. D. 126, discussed and applied.

A mortgage of an hotel to a brewer contained a covenant by the mortgagors that during the continuance of the security they would deal exclusively with the mortgagee for all beer and malt liquor sold on the mortgaged premises. The deed also contained the usual provisoes for the continuance of the loan for five years. The mortgagors having ceased to purchase beer of the mortgagee, he now moved for an injunction to restrain the breach of this covenant; the mortgagors also claimed to be entitled to redeem before the expiration of the five years:—

Held, by Romer J., that the provisoes for the continuance of the loan were valid, and that the mortgagors were not entitled, at present to redeem. This decision was not appealed from.

Held, further, by Romer J. and by the Court of Appeal, that as the covenant entered into by the parties for the purchase and supply of beer during the continuance of the security was a reasonable one, which did not in any way clog the redemption or give the mortgagee any undue advantage, it ought to be enforced by injunction.

MOTION AND ADJOURNED SUMMONS.

The plaintiff Biggs was a brewer at Cardiff, the defendants Hoddinott were the owners of the Witchill Hotel, Cadoxton, Glamorganshire, in which they carried on their business as hotel keepers. The plaintiff had a mortgage on the hotel for 7654*l.*, which was secured by an indenture of March 18, 1896, by which the defendants covenanted, in the usual way, for payment of the principal, with interest at 5*l.* per cent., on September 18 next. This deed also contained a joint and several covenant by the defendants that "they their respective executors, administrators, and assigns, owners, or tenants for the time being of the said premises will during the continuance of this security take of and deal with the plaintiff, his executors, administrators, or assigns only for all beers and stout or any other description of malt liquors (except bottled beers) which shall be vended to be consumed on or off the said hotel and premises; and while any money is owing on the security of these presents deal exclusively with the plaintiff, his executors, administrators and assigns for all malt liquors as aforesaid sold thereupon or upon any premises taken or used in connection therewith, or in anywise under or by virtue of the licence or licences now existing or being in force in respect of the same premises, including any occasional or subsidiary licence, and will not sell or permit the sale or consumption upon the said premises of any such liquors as aforesaid (except bottled beers), other than such as shall have been purchased or taken of the plaintiff, his administrators or assigns." There was a proviso that "if the defendants, their executors, administrators, and assigns shall observe fully and in all respect the covenants on their part hereinbefore contained," then the plaintiff would not call in the loan for five years: the deed also contained a proviso that notwithstanding the proviso for redemption, the defendants should not be entitled to require or compel the plaintiff to receive his principal before the expiration of five years from the date of the deed. The plaintiff also covenanted with the defendants during the continuance of the security to supply them with beer and stout or other malt liquors of the usual quality at certain scheduled prices; but the deed in no way charged any money payable for beer, &c., upon the mortgaged premises.

In the spring of 1898 the defendants ceased to purchase their beer and stout from the plaintiff, and intimated that they did not intend to purchase any more malt liquors from him, as they were advised that they were not bound by the covenant to do so; and they also claimed to be entitled to redeem the mortgage at once.

On May 4, 1898, the defendants tendered to the plaintiff the amount of his principal and interest to date, with a further sum for six months' interest in lieu of notice; but the plaintiff declined to accept it.

On May 10 the mortgagors took out an originating summons against the mortgagee to compel redemption.

On May 23 the plaintiff commenced this action, claiming an injunction restraining the defendants during the continuance of the mortgage, their servants or agents, from selling or permitting the sale or consumption upon the Witchill Hotel of any beer, stout, or other malt liquors (other than bottled beers), which shall not have been purchased and taken from the plaintiff, and for damages.

The plaintiff moved before Romer J. on June 10, 1898, for an interim injunction in the terms of his claim. The defendants' summons for redemption was adjourned into court, and came on for hearing with the motion.

Levett, Q.C., and *R. F. Norton*, for the motion. The covenant to purchase malt liquors from the mortgagee during the continuance of the mortgage in no way clogs the redemption; any money owing to us for beer is not charged on the mortgaged property. A proviso for the continuance of the loan for a term certain is very usual, and is a lawful provision: see the remarks of Jessel M.R. in *Teevan* v. *Smith* (1); and the mortgagor cannot compel the mortgagee to accept, against his will, repayment otherwise than in accordance with the contract: *West Derby Union* v. *Metropolitan Life Assurance Society*. (2) The covenants for the purchase and supply of beer have nothing to do with the equity of redemption. Covenants of this kind are valid and can be enforced: *Luker* v. *Dennis* (3); profits made under a covenant of this kind are lawful, and would not have to be accounted for by a mortgagee in possession: *White* v. *City of London Brewery Co.* (4) There is nothing unreasonable or oppressive in these provisions: it was part of the terms of the loan that the mortgagor should buy beer from us during the continuance of the security; it may be a collateral advantage,

(1) (1882) 20 Ch. D. 724, 729.

(2) [1897] A. C. 647.

(3) (1877) 7 Ch. D. 227.

(4) (1888) 39 Ch. D. 559.

but *Mainland* v. *Upjohn* (1) shews that this may be done under a bargain deliberately entered into by the parties while on equal terms and without any improper pressure or unfair dealing on the part of the mortgagee. No charge of improper pressure or unfair dealing is made against this mortgagee. For these reasons we are entitled to have the bargain entered into by the mortgagors, when the loan was made, enforced by injunction.

Farwell, Q.C., and *Ingpen*, for the mortgagors. The covenant binding the mortgagors to buy all malt liquors from the mortgagee during the continuance of the security is bad as a collateral advantage stipulated for by a mortgagee: *James* v. *Kerr* (2); a mortgagee is not entitled to anything more than his principal, interest, and costs: *Jennings* v. *Ward* (3); *Field* v. *Hopkins*. (4) It is well known what large profits are made by brewers out of tied houses, and it may be that a covenant of this kind will give the mortgagee the whole amount of his principal and interest by way of profits, and that is an unfair collateral advantage, which, if *Jennings* v. *Ward* (3) is good law, cannot be maintained.

[ROMER J. The proposition stated in *Jennings* v. *Ward* (3) seems to me to be too wide, having regard to the later authorities.]

The rule was recognised by Lord Bramwell, though unwillingly, in *Salt* v. *Marquis of Northampton*. (5) This is an attempt by a brewer under the guise of a mortgage to get all the advantages of a tied house: a bargain that the Court has never allowed between mortgagor and mortgagee.

With reference to the summons to redeem, we submit that, notwithstanding the provisoes for the continuance of the loan, we are entitled under the circumstances to redeem now. A simple proviso for continuance of the loan for a term certain is good; but this is not a simple proviso for continuance of the loan: the two provisoes depend on each other, and are in effect one transaction; this is a clogging of the redemption, and therefore the whole is void. The mortgage is to be irredeemable for five years in order to give effect to this covenant, and an unreasonable bargain of this kind cannot be enforced: Fisher on Mortgages, 5th ed. p. 669; *Talbot* v. *Braddill* (1); *Cowdry* v. *Day*. (2) For these reasons we submit that the mortgagors are entitled to redeem at once.

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(1) 41 Ch. D. 126.
(2) (1889) 40 Ch. D. 449.
(3) 2 Vern. 520.
(4) (1890) 44 Ch. D. 524.
(5) [1892] A. C. 1, 19.

Romer J. With regard to the summons by the mortgagors to redeem, I do not require to hear counsel for the mortgagee, and I think it will be convenient to dispose of that application at once before hearing the reply on the motion.

It appears to me that I am bound by authority, and also on principle, to dismiss this summons.

I take it that what was said by Sir George Jessel in *Teevan* v. *Smith* (3) is good law, at any rate, so far as I am concerned, and, indeed, I trust good law in whatever court the question may ultimately be raised, namely, that, "Although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years." The period in the present case is five years.

Now, I am of opinion that it is obviously to the advantage of both the mortgagor and mortgagee that such a provision should be enforced. Of course, that does not prevent the Court in a proper case from preventing the application of the clause if it is too large, or there are circumstances connected with the proviso which renders it, in the opinion of the Court, unreasonable or oppressive. In the present case I can find nothing unreasonable or oppressive in the proviso which prevents the mortgagors from redeeming for the five years. The term is not unreasonable, nor is there anything connected with the proviso which would render it unreasonable or oppressive in the eyes of the Court. It is said that it is not in itself bad, but that it is made so by reason of the covenant in the mortgage which compels the mortgagors during the continuance of the security to buy their beer from the mortgagee, who is a brewer. Well, that covenant is either in itself unreasonable, or not unreasonable. There is nothing before me to shew that as a covenant it is unreasonable, under the circumstances, there being a covenant almost corresponding by the mortgagee, the brewer, to supply. There is nothing oppressive in it itself. There is no evidence to shew me that it is unreasonable or oppressive. Whether, apart from being unreasonable or oppressive in fact, it ought to be void as infringing any principle of equity, I need not now decide, though I shall have to decide that hereafter. Either that covenant is void, or not void, on such a principle. If it be void, then I do not see why I should make the proviso precluding the redemption for five years bad, because there is also another void provision in the deed. And if it is not void, why should I disregard the proviso restricting the power to redeem for five years because of the existence of a covenant which the Court considers enforceable, and which is not unreasonable? It seems to me, therefore, that, looking at the mortgage as a whole, there is nothing here which in my opinion would prevent this proviso precluding the redemption for five years being enforced by the Court. I accordingly enforce it. I am of opinion that it is a proviso which stands by itself, and is distinct from the prior covenant in the deed which deals with the time during which the mortgagees are to be prevented from calling in their money. For these reasons, I hold that the mortgagors are wrong in claiming to redeem at once, i.e., before the five years have expired; and I therefore dismiss this summons with costs.

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(1) (1683) 1 Vern. 183. (2) (1859) 1 Giff. 316.
(3) 20 Ch. D. 729.

Farwell, Q.C. I am afraid that the dismissal of an action or summons for redemption operates as a foreclosure. I would suggest that the order should be, "The Court being of opinion that the application by the mortgagors was premature, no order except that they do pay the costs of the summons."

ROMER J. That is quite right: take your order in that way. I certainly did not intend you to be foreclosed.

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Levett, Q.C., in reply. The effect of the decision in *Jennings* v. *Ward* (1), as stated in the text-books, is misleading; all that case decided was that no fetter can be put on the redemption. *French* v. *Baron* (2) is to the same effect. The result of all the authorities when carefully examined is this—that for purposes of redemption the Court will not allow in the accounts any bargain increasing by collateral means the sum payable for principal, interest, and costs. None of the cases relied on by the mortgagors shews that a reasonable stipulation of this kind cannot be enforced.

ROMER J. There is a great principle which I think ought to be adhered to by this Court, and by every Court where it can possibly do so; that is to say, that a man shall abide by his contracts, and that a man's contracts should be enforced as against him. Undoubtedly there are certain principles of equity, especially those relating to mortgagors and mortgagees, which have to a certain extent interfered with that general principle, and with those cases I shall have to deal. But before I do so I wish in the first place to point out that, unless there is some doctrine of equity which would otherwise prevent me enforcing the covenant here, the covenant is one which in my opinion ought to be enforced; that is to say, looking at the circumstances (and there is no evidence before me which alters the circumstances as appearing on the face of the mortgage deed itself) it appears to me that the transaction entered into was a reasonable and proper one. The covenants entered into by the mortgagors and the mortgagee with reference to the supply and purchase of beer appear to me to have been reasonable and entered into in good faith, and are in no sense oppressive upon the mortgagors. Unless, therefore, there is some principle of equity affecting mortgagors and mortgagees which prevents me from enforcing this covenant, I ought to enforce it. I should be very sorry indeed if I found there was any such principle; and on considering the principles to which my attention has been called, and the authorities bearing upon them, I am glad to say that I do not think there is any

(1) 2 Vern. 520.

(2) (1740) 2 Atk. 120.

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principle or any authority which prevents me from enforcing this covenant as against the mortgagors.

Now, there is a principle which I will accept without any qualification for the purpose of my present judgment (although possibly even that principle might have to be considered narrowly with reference to special cases) that on a mortgage you cannot, by contract between the mortgagor and mortgagee, clog, as it is termed, the equity of redemption so as to prevent the mortgagor from redeeming on payment of principal, interest, and costs. Of course, I mean redeeming at the time agreed upon between the parties for redemption.

Does that principle apply to the case before me so as to prevent this covenant by the mortgagors from being enforced against them? I am clearly of opinion that it does not. There is nothing in this covenant which clogs the equity of redemption. The mortgagors' right to redeem under the mortgage deed stands exactly the same whether this covenant to take the beer from the brewer, the mortgagee, is in the deed or not. The mortgagee by virtue or in respect of that covenant has no right to stop or check redemption. He could not stop redemption because there had been any breach of that covenant. There is no charge upon the mortgaged premises in favour of the mortgagee for any sums which might become due to him under or by virtue or by reason of any breach of that covenant by the mortgagors. It therefore appears to me impossible to say that this covenant in any way interferes with the principle about not clogging the equity of redemption. But then it is said on behalf of the mortgagors that there is a much larger principle which would prevent this covenant from being held binding on them, and they say that the principle is stated in the case of *Jennings* v. *Ward* (1), which is a well-known authority, where the Master of the Rolls undoubtedly said that a man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement. I have already dealt with the question of clogging the redemption. It is said that the observations of the Master of the Rolls are to be taken to their fullest extent, and that in every case it is to be taken that a mortgagee shall not have interest for his money and a collateral advantage besides for the loan. ✓

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(1) 2 Vern. 520.

Now, I must say it appears to me always a good principle in dealing with general observations to bear in mind the case in which those observations were made, and with reference to what circumstances they were made. And when I turn and look at the circumstances of *Jennings* v. *Ward* (1) two things appear. In the first place, the Master of the Rolls was dealing in fact with a case where a mortgagor came to redeem, and it was sought to clog his redemption by saying that there was a collateral agreement with regard to other property which ought to prevent his being allowed to redeem. It was, in fact, a case of clogging the equity of redemption. But beyond that, when you look and see what was the collateral agreement in question there, it is to be observed it was one about which the Master of the Rolls said that it must be set aside as unconscionable. So that it was a case where the collateral agreement was unconscionable in itself, and it was in reference to a case like that that the Master of the Rolls made the observation that he did. Moreover, it is very important to bear in mind that when the Master of the Rolls made that observation the usury laws were in force, and the Courts were very anxious to prevent a person getting a rate of interest beyond what he was entitled to receive under the guise of collateral advantages not expressed to be in the form of interest. Now, can I find in any subsequent case any decision which shews that the observation of the Master of the Rolls is to be taken as unlimited? I can find no such case. The cases to which I have been referred, and which I have considered, are really cases, when you examine them, where it is sought to clog the equity of redemption by saying that the mortgagor seeking to redeem has to pay some sum beyond what was really due for principal, interest, and costs. That is so, for example, in *French* v. *Baron* (2) and other authorities, where the question concerned the costs of a receiver of the rents and profits of the mortgaged premises. In these cases the question was one of account. The question was, What was due when you came to redeem?—not the question, in substance, whether an honest and proper agreement, entered into without oppression and reasonable, ought to be held void simply because it was a contract between mortgagor and mortgagee. And I point out that you must certainly put aside the cases before the repeal of the usury laws, which stand on a different footing, and, of course, cases of oppression and unreasonableness. Lord Eldon, in the case of *Chambers* v. *Goldwin* (1), stated the law of the Court at the time on the subject in question. I need not repeat that judgment now, because it is set forth in Kay J.'s judgment in *Mainland* v. *Upjohn*. (2) I need only say that I agree with what Kay J. says at the top of page 138 of that report as summing up how the law stood. He says: "I read that for this reason, that Lord Eldon there, although no doubt one objection he makes to these exactions was that they tend to usury, still does not rest his objection entirely upon that ground. He says, besides, that they are oppressive, and are exactions that a mortgagee is not allowed to make."

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(1) 2 Vern. 520.

(2) 2 Atk. 120.

Putting aside questions of usury, and putting aside contracts which are oppressive, or which are exactions that a mortgagee is not allowed to make, I see no reason why a contract between mortgagor and mortgagee, entered into in good faith as a reason for the mortgagee advancing his money, should not stand and receive the support of this Court, subject to the limitation I have already pointed out as to clogging the equity of redemption. It appears to me, notwithstanding some observations that you may find, especially some made by Kay J. in some of his decisions, which I think ought to be interpreted by reference to the special facts of the cases in which those observations were made, it is not true to say that in every contract for a mortgage, every provision is void whereby a mortgagee gets more than the principal he advances, and his interest and costs. I think there is no objection (within the lines I have mentioned) to an advantage being derived by a mortgagee in his contract at the time, and as a term of the advance. Where such an advantage is part of the consideration for the advance, and the mortgagor has the benefit of the advance, he is primâ facie bound by it, unless he can bring himself within some of the limitations laid down by the cases to which I have already referred.

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(1) (1804) 9 Ves. 254.

(2) 41 Ch. D. 126.

Now, that the principle is not so wide as has been urged before me on behalf of the mortgagors, and that the words of the Master of the Rolls in *Jennings* v. *Ward* (1) are to be taken with some limitation, is clear on the authorities. I need only mention two: *Potter* v. *Edwards* (2) and the case of *Mainland* v. *Upjohn* (3), to which I have previously referred. They shew, for example, this: that a mortgagee can contract with his mortgagor that in consideration of an advance of, say, 700*l.*, he shall be repaid 1000*l.* at a future time, with interest on the 1000*l.* in the meantime. In that case the bargain stands and cannot be disturbed, and for a very good reason—the mortgagor obtained his advance on the footing and faith of the contract. Here the mortgagors have obtained this advance, and probably at a reduced rate of interest, on the very terms of this covenant, or because of the existence of this covenant—an advantage which they have derived and now seek to escape the consequences of. As I have said, I can find no authority which would shew that such a covenant as this by the mortgagors is under the circumstances to be held void. Certainly the cases specially relied on before me on behalf of the mortgagors do not amount to constituting such authority. Take the case of *James* v. *Kerr*. (4) When looked at it will be found that the facts shew that the agreement there relied upon by the mortgagee was oppressive and improper, and moreover clogged the equity of redemption. Then take the case of *Broad* v. *Selfe* (5), which has been referred to. That was peculiarly a case affecting a question of account—the right to redeem—questions affecting the clogging of the equity of redemption. The case of *Field* v. *Hopkins* (6) was, again, a mere question of on what terms, as to amount, the mortgagor should be permitted to redeem, and, moreover, was a case where the mortgagee was claiming to charge items which, under the circumstances, certainly he never ought to have sought to charge as against the mortgagor. It is to be noticed that when that case came before the Court of Appeal, as it did, they dealt with it purely as a question of construction, and did not, as they undoubtedly would had the argument before me been correct, say that the mortgagee was not entitled to make the charges in question, because the contract with regard to those charges was altogether invalid. It is impossible to suppose that the Court of Appeal, with the learned and experienced judges sitting there, would have overlooked a point of this kind if such a point could have been made.

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(1) 2 Vern. 520.
(2) (1857) 26 L. J. (Ch.) 468.
(3) 41 Ch. D. 126.
(4) 40 Ch. D. 449.
(5) (1863) 11 W. R. 1036.
(6) 44 Ch. D. 524.

Lastly, the case before the House of Lords, *Salt* v. *Marquis of Northampton* (1), had nothing whatever really to do with the point I have to decide here. That was merely a question whether a certain policy was mortgaged; and when the House of Lords held that the policy was mortgaged, it of course followed that in equity a bargain seeking to prevent the mortgagor from having the right to redeem it could not be enforced. I need scarcely point out, therefore, that that has no bearing really upon the question before me.

Finding, therefore, as I do in the result, an honest bargain entered into, the benefit of which has been obtained by the mortgagors, and finding, as I am glad to say and as I think, no principle or authority which prevents me from enforcing this contract on the mortgagors' part, I enforce it accordingly, and therefore grant the injunction in the terms of the notice, limiting it according to those terms during the continuance of the security; and the defendants, of course, must pay the costs.

W. C. D.

C. A. The defendants appealed from the order on the motion. The appeal was heard on July 6, 1898.

Farwell, Q.C., and *Ingpen*, for the appeal. We contend that the covenant to take beer from the mortgagee alone is invalid.

[Collins L.J. A mortgagee may now stipulate for any rate

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(1) [1892] A. C. 1.

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of interest he likes. Why may he not take a lower rate and stipulate for a collateral advantage of this kind?]

Jennings v. *Ward* (1) lays down the broad principle that a mortgagee shall not by the mortgage deed stipulate for any advantage beyond principal, interest, and costs. *Chapple* v. *Mahon* (2) does not merely say that a covenant for a collateral advantage to the mortgagee will not be enforced in a foreclosure or redemption suit, but that it is void. *In re Edwards's Estate* (3) affirms the same principle. Romer J. appears to lay down that any bargain between mortgagor and mortgagee which is not unconscionable and does not clog the equity of redemption is valid, but in this he ignores the above rule. In *Chambers* v. *Goldwin* (4) Lord Eldon lays it down that a mortgagee cannot stipulate to be a receiver of West India estates with a commission, nor stipulate for any advantage beyond the interest. Afterwards mortgagees of West India estates, if not in possession, were allowed to be consignees and to charge commission; but Lord Brougham in *Leith* v. *Irvine* (5) refused to extend the practice to a mortgagee in possession, and expressed a doubt (6) whether *Bunbury* v. *Winter* (7) was rightly decided, and whether *Cox* v. *Champneys* (8) supported the case of the mortgagee. In *Potter* v. *Edwards* (9) a mortgage was given for 1000*l.* though only 700*l.* was advanced, and Kindersley V.-C. held that there could only be redemption on payment of 1000*l.* with interest and costs. This may be treated as if the mortgagee had paid the 1000*l.*, and by subsequent gift received the 300*l.* back again. In this case the point here in question was not argued. *Mainland* v. *Upjohn* (10) follows *Potter* v. *Edwards* (9), but is opposed to the decision of Lord Romilly in *Broad* v. *Selfe* (11) there referred to, and it is submitted that this authority ought to have been followed. *Eyre* v. *Hughes* (12) affirms the rule that a mortgagee will not be allowed in the mortgage deed to stipulate that he shall be allowed commission on rents received by him. The cases of *James* v. *Kerr* (1), *Field* v. *Hopkins* (2), and *Salt* v. *Marquis of Northampton* (3), all support the principle that a mortgagee not only cannot clog the equity of redemption, but cannot bargain for any collateral advantage. Moreover, in this case the equity of redemption is clogged, for the mortgagors cannot let the property to the same advantage when it is burdened with a covenant of this nature.

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(1) 2 Vern. 520.
(2) (1870) Ir. R. 5 Eq. 225.
(3) (1861) 11 Ir. Ch. Rep. 367.
(4) 9 Ves. 271.
(5) (1833) 1 My. & K. 277.
(6) Ibid. 292, 295.
(7) (1820) 1 Jac. & W. 255.
(8) (1822) Jac. 576.
(9) 26 L. J. (Ch.) 468.
(10) 41 Ch. D. 126.
(11) 11 W. R. 1036.
(12) (1876) 2 Ch. D. 148.

Levett, Q.C., and *R. F. Norton*, for the mortgagee, were not called on.

LINDLEY M.R. We have listened to a very ingenious and learned argument with the view of inducing us under pressure to lay down a proposition of law which would be very unfortunate for business men. The proposition contended for comes to this—that while two people are engaged in a mortgage transaction they cannot enter into any other transaction with each other which can possibly benefit the mortgagee, and that any such transaction must be before or after the mortgage, and be independent of it, so that it cannot be said that the mortgagee got any additional benefit from the mortgage transaction. Mr. Farwell did not attempt to uphold this on any rational principle, but relied on authority. Of course, we must follow settled authorities whether we like them or not; but do they support this proposition? *Jennings* v. *Ward* (4) was the first case relied upon. That was a redemption suit, and the stipulation which was in question seriously interfered with the redemption of the mortgaged property, and the Master of the Rolls (Sir J. Trevor) decreed redemption without regard to that stipulation. He is reported to have said: "A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." That has been understood as meaning exactly what was said, without regard to the circumstances of the case, and has found its way into the text-books as establishing that a mortgagee cannot have principal, interest, and costs, and also some collateral advantage.

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(1) 40 Ch. D. 449, 460.

(2) 44 Ch. D. 524.

(3) [1892] A. C. 1, 19.

(4) 2 Vern. 520.

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But that supposed rule has been departed from again and again. Take the case of West India mortgages: it has been repeatedly decided that the mortgagee, if not in possession, may stipulate that he shall be appointed consignee. The proposition stated in *Jennings* v. *Ward* (1) is too wide. If properly guarded it is good law and good sense. A mortgage is regarded as a security for money, and the mortgagor can always redeem on payment of principal, interest, and costs; and no bargain preventing such redemption is valid, nor will unconscionable bargains be enforced. There is no case where collateral advantages have been disallowed which does not come under one of these two heads. To say that to require such a covenant as that now in question is unconscionable is asking us to lay down a proposition which would shock any business man, and we are not driven to it by authority. The proposition laid down by Hargreave J. in *In re Edwards's Estate* (2), that where an onerous contract entered into by a mortgagor with his mortgagee is part of the arrangement for the loan, and is actually inserted in the mortgage deed, it is presumed to be made under pressure, and is not capable of being enforced, goes too far, though the decision of the learned judge was correct; for the stipulation with which he had to deal was unreasonable, and one which ought not to be enforced. The appeal will be dismissed.

CHITTY L.J. The mortgage here is a mortgage of a public-house for a time certain by publicans to a brewer, effected in the usual way, and it contains a covenant by the mortgagors during the continuance of the security to take all their beer from the mortgagee, and a covenant by the mortgagee to supply it. It is contended that the covenant by the mortgagors is void in equity. The first objection I have to make is that it in no way affects the equity of redemption, for it is not stipulated that damages for breach of the covenant shall be covered by the security, and redemption takes place quite independently of the covenant; so this is not a case where the right to redeem is affected. Equity has always looked upon a mortgage as only a

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(1) 2 Vern. 520.

(2) 11 Ir. Ch. Rep. 367.

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security for money, and here the right of the mortgagors to redeem on payment of principal, interest, and costs is maintained. It has been contended that the principle is established by the authorities that a mortgagee shall not stipulate for any collateral advantage to himself. I think the cases only establish that the mortgagee shall not impose on the mortgagor an unconscionable or oppressive bargain. The present appears to me to be a reasonable trade bargain between two business men who enter into it with their eyes open, and it would be a fanciful doctrine of equity that would set it aside.

As regards the authorities, *Jennings* v. *Ward* (1) was relied on. That was a redemption suit, and the Master of the Rolls decreed redemption without regard to a certain agreement which he considered unconscionable and set aside as being "unreasonable," as appears from the registrar's book, which we have now in Court: Reg. Lib. 1705, fol. 495. The statement by Hargreave J. in *In re Edwards's Estate* (2) that a mortgagor is considered to be under pressure is not a universal principle. The first great departure from any such principle is found in West India mortgages, where a mortgagee is allowed to be consignee if not in possession. It was found that the supposed rule to the contrary founded on the dicta, not the decisions, of judges, would not work, for that mortgagors could not obtain money except on these terms. *Potter* v. *Edwards* (3) is a clear authority the same way. There it is said that the money was paid and partly repaid as commission; but that is a fiction. The plain transaction was that the mortgagor agreed to receive 700*l.* and give a mortgage for 1000*l.* *Mainland* v. *Upjohn* (4) is another illustration. The decision of Hargreave J. in *In re Edwards's Estate* (2) was right, for in that case there was an unconscionable bargain, and a direct clog on the right to redeem. It is unnecessary to say more: the covenant in this case is not avoided by any such supposed rule of equity as has been contended for.

Collins L.J. I am of the same opinion. Apart from authority, no one would say that this stipulation was invalid, for it seems a reasonable and businesslike one. But it is said that mortgages are subject to a long series of decisions, and no doubt equity judges have tried to lay down some principle which would explain satisfactorily the decisions of their predecessors and account for their own, but in so doing they have sometimes laid down principles which, when applied to other cases, are too wide. The fact is that those decisions were given in particular hard cases, and judges have afterwards endeavoured not always successfully to reduce them to a general rule. The only safe thing is to see how far the decisions have gone. It is clear that a mortgage in the view of a Court of Equity is simply a loan on security, and nothing inconsistent with that can be imported into the deed, and Hargreave J. in *In re Edwards's Estate* (1) probably had in his mind the principle that provisions inconsistent with the nature of a mortgage are illegal. But the principle which he laid down, that no onerous engagement of any description can be entered into by a mortgagor with his mortgagee on the occasion of the mortgage, was not necessary for the decision of the case before him, for the stipulation there was one which interfered with the right of redemption on payment of principal, interest, and costs.

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(1) 2 Vern. 520.
(2) 11 Ir. Ch. Rep. 367.
(3) 26 L. J. (Ch.) 468.
(4) 41 Ch. D. 126.

On what principle can any stipulation in a mortgage deed which does not fetter the right of redemption be held invalid? I think only on the general principle that effect will not be given to what is unconscientious and oppressive. No narrower principle will work. Here the provision is reasonable and does not fetter the equity of redemption. The wide proposition in *Jennings* v. *Ward* (2) was not necessary for the decision in that case, and there is nothing in this case to bring it within that decision. The mere fact that a stipulation for the benefit of the mortgagee is contained in the mortgage deed does not necessarily make that stipulation invalid.

Solicitors: *Riddell, Vaizey & Smith, for J. Henry Jones, Cardiff; Bower, Cotton & Bower, for Stephens, David & Co., Cardiff.*

(1) 11 Ir. Ch. Rep. 367.

(2) 2 Vern. 520.

H. C. J.

C. A.
1898
June 14.

In re C. M. G., SPINSTER (A PERSON OF UNSOUND MIND NOT SO FOUND).

Lunacy—Lunatic Sole Trustee—Stock—Vesting Order—Transfer of Consols—Form of Order—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 136, *sub-ss.* 1, 4; *ss.* 137, 142.

A person of unsound mind not so found being sole trustee of a sum of Consols, the Judge in Lunacy, upon the application of A. B., made an order, under the Acts of 1890 and 1891, that the right to call for a transfer of, and to transfer into his own name, the Consols standing in the name of the lunatic, and to receive the dividends thereon, should vest in A. B., and that he should transfer the Consols into his own name to be held by him upon the trusts applicable thereto.

The Bank of England refused to act upon an order in this form upon the ground that, under s. 137 of the Act, some proper officer of the bank should have been appointed to make the transfer:—

Held, that the order made by the judge was right, and that the bank must act upon it, and must allow the Consols to be transferred accordingly.

In re Gregson, [1893] 3 Ch. 233, approved.

Per Chitty L.J.: The 137th section of the Lunacy Act, 1890, applies, so far as the 136th is concerned, only to sub-s. 4 thereof.

C. M. G., a person of unsound mind not so found by inquisition, was, as sole executrix of a will, trustee within the meaning of the Lunacy Act, 1890, of a legacy of 1000*l.* invested in a sum of New Consols, which now amounted to 1150*l.* 0*s.* 11*d.* like Consols, and was standing in her name in the books of the Bank of England.

The legatee had died, and C. P. F. was the legal personal representative of the legatee.

Upon the application of C. P. F. an order, dated March 8, 1898, was made by A. L. Smith, L.J., under s. 136, sub-s. 1, of the Lunacy Act, 1890, "that the right to call for a transfer of, and to transfer into his name, the sum of 1150*l.* 0*s.* 11*d.* New Consols standing in the books of the Governor and Company of the Bank of England in the name of C. M. G. of . . . . and to receive the dividends due and to accrue due thereon do vest in the said C. P. F. of . . . . and that he do transfer the same into his own name accordingly to be held by him upon the trusts applicable thereto."

The Bank of England refused to act upon this order on the ground that the applicant was "a person appointed to make . . . . a transfer of stock" within the meaning of s. 137 of the Lunacy Act, 1890, and that in accordance with the terms of that section such person ought to be "some proper officer of the bank."

C. P. F. now applied by motion in the matter of the legacy and of the lunacy and of the Lunacy Acts, 1890 and 1891, that the Governor and Company of the Bank of England might be directed to act upon the order made on March 8, 1898, and might be ordered to pay the costs of the application.

Sampson, in support of the application. The question as to the proper form of order to be made in a case like this has been already more than once raised by the Bank of England. It was finally settled by this Court in *In re Gregson* (1), and the order upon which the bank now refuse to act was made in the form which the Court in that case decided to be the right one. The present order was made under s. 136, sub-s. 1, of the Act of 1890. Sect. 137 has no application to any part of s. 136, except sub-s. 4, which enacts that "if it is more convenient" (and in this case it is not) the Court "may appoint" some proper person to make the transfer. But the convenience there alluded to was not the convenience of the bank, but that of the parties interested.

Latham, Q.C., and *Howard Wright*, for the Bank of England. *In re Gregson* (1) was a Lunacy case under the Trustee Act, 1850; and in cases of that kind it was common not to appoint an officer of the bank. This case is covered by s. 137 of the Act of 1890. An order vesting in a person the right to transfer stock, whether made under ss. 133, 134, or 136, is in effect equivalent to an order appointing a person to make the transfer. This construction is strengthened by a comparison of the language of the various sub-sections of s. 135. Sub-s. 4 of s. 136 applies to all cases where an order can be made under

(1) [1893] 3 Ch. 233.

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s. 136, and the language of s. 137 must be held applicable to all cases in which any person is appointed to make a transfer; and as making it imperative in such cases that such person shall be the proper officer of the bank. This obviously is the convenient course.

[They referred to *Bank of England* v. *Vagliano Brothers* (1) and *In re Shortridge*. (2)]

Sampson, in reply. The bank has been obstructive, and ought to pay the costs of this application. The order made was in an old and well-settled form. By s. 136, sub-s. 5, the bank is bound to obey the order.

Lindley M.R. Upon the question raised by the bank as to the necessity of having the orders drawn up in the form that they now contend for, I think they are wrong; and I not only think they are wrong, but I think it is a great pity that after having, five years ago, invited the Court to put the matter right in *In re Gregson* (3), they should have reopened the question, and tried to get another form of order. I think they are wrong on the true construction of the Lunacy Act, 1890. We know perfectly well—at least all of us who are familiar with the Chancery practice—that there are, and ever since the Trustee Act, 1850 (13 & 14 Vict. c. 60), have been, two forms of order. One is what is called "a vesting order," which, when drawn up, for convenience generally directed—and in the case of trustees always directed—the persons in whom the land or stock was to be vested to do what was necessary to get the money into their hands. The object of that is obvious: they wanted to get the money, and see that the money was safe. That is, so far as I recollect, the history of the order; and Mr. Latham has confirmed me in that—that these orders as to vesting and the right to transfer stock and so on have always been followed by ordering the persons appointed to transfer into their own names, or into their names jointly with other people as the case may be.

Now, contrasted with that, from 1850 downwards, there was an alternative method not making any vesting order at all, but appointing somebody to convey or transfer, which had advantages; and in cases of shares exposing their holder to liability the difference is an all-important one. Trustees are not fond of having shares involving liability vested in them, or of being told to put such shares into their own names. It may expose them to ruin, as it did in the case of the Glasgow Bank (1); and that is not wanted. What is wanted is something short of that—namely, the appointment of somebody to transfer without vesting in him what is transferred, and to get it into the proper name. Therefore, there was sense in the difference between the two forms, and the two forms have been running on for the last forty years to my knowledge. In construing the Act of 1890 you have to bear that in mind; and in that Act of Parliament (which is more or less a consolidating Act) we find in the part as to management and administration, those parts of the Trustee Act which relate to lunacies, or which are convenient to repeat in the Lunacy Act, inserted in ss. 135 and 136. These provisions begin at s. 133 and run on to s. 137, and you find the distinction preserved. Why it is that in ss. 133 and 134 the language is different—"that the judge may order some fit person to transfer," as distinguished from appointing somebody to do the thing, or as distinguished from vesting—I do not know. It may be that an order under s. 133 or s. 134 may be equivalent to appointing somebody to transfer the stock. It would be more like that than like a vesting order, although the language differs for some reason which I do not understand. But, when we come to s. 136, the distinction is marked and plain. That provides for the vesting order the form of which was perfectly well known in 1890; and in sub-s. 4 we have orders appointing some proper person to transfer. Then comes s. 137, and that is confined to persons appointed to transfer. Of course, in a sense every vesting order which is followed by an order directing the person to transfer is an order appointing him to do it. But it is a great deal more, and in the language applicable to this class of cases and running through a series of Acts you find the two expressions contrasted. It appears to me that the bank is wrong in substance.

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(1) [1891] A. C. 107.
(2) [1895] 1 Ch. 278.
(3) [1893] 3 Ch. 233.

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(1) See *Muir* v. *City of Glasgow Bank*, (1879) 4 App. Cas. 337.

As to the costs, there is some difficulty about the jurisdiction—a difficulty arising from the construction of s. 142 of the Act of 1890; and having regard to that, and to the observations made by the Court in *In re Shortridge* (1), I do not think this is a case for ordering the bank to pay costs. Of course, the bank will not get their costs. It is convenient to have these questions decided upon applications of this kind, rather than to apply for a mandamus, which is much more expensive and much more dilatory. And, so far as the bank assists in a speedy and comparatively inexpensive determination of the case, the Court would not saddle them with costs, unless in an extreme case. I will not say that we could not, if it was a very bad case; but we will reserve that until it arises. The bank must carry the order out and transfer the stock in the regular course as thereby directed.

Chitty L.J. I am of the same opinion. The Legislature has conferred jurisdiction upon the Court of Chancery, and also upon those who are entrusted with the care of lunatics, to deal with property so as to pass it. There were, as the Master of the Rolls has pointed out, two very well-known forms of order: the one was, taking the case of land, to make an order directly vesting the land. But it was seen (as s. 20 of the Act of 1850 points out) that that would not be always convenient. And consequently there was another method, which was to appoint some one to convey. It was a method which was much more convenient where purchase-money had to be paid. Then, in regard to stock, the Legislature has never entrusted either of the Courts that I have referred to with the power of transferring the stock in the books of the company; and even when the Conveyancing Act was passed, and a power was given on the appointment of new trustees to vest property by a mere declaration, "stocks" that passed by transfer in the books of the Bank of England and other public companies were excepted; and consequently the form was to transfer, or to vest

(1) [1895] 1 Ch. 278.

the right to transfer, and to call for the transfer, in certain persons. But then there was also a corresponding form of order which was in certain cases more convenient, as again pointed out by the 20th section, and this runs through all the legislation on the subject of appointing somebody to transfer instead of making an order vesting the right to transfer. That is settled and clear.

In the present case the order goes on, as orders have continually done with reference to the appointment of new trustees, to direct the persons in whom the right of transferring is vested how they are to exercise that power in the shape of a clear order on the subject. The trustees are not to transfer to any one they think fit. They are ordered to exercise the power of transfer in their own name. In my opinion that practice has grown up by a gradual process. I believe if it were necessary to investigate it, it would be found quite justified by the Act of Parliament; but it is not necessary to investigate it. It may be within the general jurisdiction of the Court also. That order upon the persons in whom the right is vested is not in my opinion an appointment of a person to make the transfer. I find the language which I have referred to is contained in the 136th section and in the 4th sub-section: "Where an order can be made under this section, the judge may, if it is more convenient, appoint some proper person to make or join in making the transfer." Then I think the 137th section applies, so far as the 136th section is concerned, only to that 4th sub-section of s. 136. That appears to me to be a reasonable and right construction. It is unnecessary to say whether the 137th section applies to ss. 133 and 134. I agree with what the Master of the Rolls has said as to that. One can quite understand why the draftsman has altered the language as I think he has done; and it may be that the proper course in such cases would be to make orders appointing some person—the proper officer of the bank—to make a transfer. There is a distinction upon this Act, as it stands, between the vesting of the right to transfer, and the appointing some proper person to make or join in making the transfer.

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For these reasons, I think on the main question the bank is wrong. But as to costs, I have nothing to add to what the Master of the Rolls has said.

COLLINS L.J. I am of the same opinion.

Solicitors: *Johnson, Weatherall & Sturt; Freshfields & Williams.*

W. W. K.

GRAND JUNCTION WATERWORKS COMPANY *v.* HAMPTON URBAN DISTRICT COUNCIL.

STIRLING J.
1898
June 7, 8, 14.

[1898 G. 526.]

Jurisdiction—Injunction—Proceedings before Justices—Public Health (Buildings in Streets) Act, 1888 (51 *&* 52 *Vict. c.* 52), *s.* 3—*Rules of the Supreme Court,* 1883, *Order xxv., r.* 5.

The Court will not interfere by way of injunction or declaration of right where the Legislature has pointed out a mode of procedure before a magistrate; unless (it seems) in very special circumstances.

Lord Auckland v. *Westminster District Board of Works,* (1872) L. R. 7 Ch. 597, *Kerr* v. *Preston Corporation,* (1876) 6 Ch. D. 463, and *Stannard* v. *Vestry of St. Giles, Camberwell,* (1882) 20 Ch. D. 190, considered.

THE plaintiffs were a company incorporated by the Act 51 Geo. 3, c. clxix., and having power under that and subsequent Acts to construct certain waterworks wherewith they supplied water to the district which by their Acts they were authorized and bound to supply. Under the powers of the Grand Junction Waterworks Act, 1852, and the Acts incorporated therewith, the plaintiffs in 1853 compulsorily acquired the fee simple of a piece of land within the defendants' district. Upon this land they had constructed certain works, and had from time to time added thereto. In 1897 additional pumping accommodation having become necessary, the plaintiffs resolved to build on a vacant portion of this piece of land an engine-house in connection with their existing works.

A dispute having arisen between the plaintiffs and the defendants as to whether or not the plaintiffs had power to erect the engine-house without the defendants' consent, a correspondence took place between the parties.

On September 24, 1897, the defendants' surveyor wrote to the secretary of the company as follows: "I understand that your company are about to erect new buildings adjoining and abutting upon the Upper Sunbury Road in this district. I wish to point out to you that no plans for such buildings have been deposited in accordance with the requirements of my council's by-laws, and further that it is proposed to erect such buildings contrary to the provisions of the Public Health (Buildings in Streets) Act, 1888."

Then further communications took place, and plans were submitted by the plaintiffs to the defendants, and on October 14 the defendants' clerk wrote to the plaintiffs informing them that the council had rejected the plans on the ground that according to those plans the proposed new engine-house was to be brought forward beyond the front main wall on either side thereof.

Further correspondence then passed between the solicitors of the parties, the plaintiffs' contention being that by their private Act of 1852 they were exempted from the operation of the provisions of the Public Health Act, 1888, on which the defendants relied.

On October 20, 1897, the plaintiffs gave the defendants notice of their intention to proceed with the construction and erection of the engine-house, and afterwards commenced the same.

On November 11, 1897, the defendants' clerk wrote to the plaintiffs' solicitors that if the work was proceeded with he was directed to take legal proceedings against the plaintiffs for contravening the Public Health Act, 1888, by so proceeding.

On December 15, 1897, the plaintiffs gave the defendants notice that they intended to proceed with the erection of the engine-house, and such erection was accordingly continuously proceeded with, and at the date of the issue of the writ in this action the plaintiffs had expended upwards of 1500*l*. upon the building.

On March 7, 1898, the defendants gave the plaintiffs notice that they were committing an offence under the Public Health (Buildings in Streets) Act, 1888, s. 3, and required the immediate discontinuance of the alleged offence.

The plaintiffs thereupon, on March 12, 1898, issued the writ in this action, claiming a declaration that they were entitled to erect the engine-house and any other buildings they might think proper for the purposes of their works upon any portion of the said piece of land without the consent of the defendants.

On March 13, 1898, the defendants gave notice to the plaintiffs of their intention to issue a further summons against them for the recovery of penalties under the Act.

On March 15, 1898, the defendants caused an information to be laid before one of Her Majesty's justices of the peace for Middlesex, alleging that the plaintiffs had committed an offence under the Act; and upon the hearing of a summons which was issued by the magistrate it was found as a fact that the plaintiffs' building did project beyond the front main wall of the house or building on either side, and the magistrates inflicted a fine upon the plaintiffs. The plaintiffs thereupon applied for a special case with a view to taking the matter before the Divisional Court.

The statement of claim in the action was delivered on April 18, and thereupon it was met by a defence which in paragraph 11 said: "The defendants having regard to the provisions of the said Act of 1888 deny that upon the true construction of the plaintiff company's Acts, the Waterworks Clauses Act, 1847, and the other Acts incorporated with the company's said Acts the plaintiff company is entitled to erect their said engine-house or any other buildings they may think proper for the purposes of their said works upon any portion of the piece of land in the statement of claim specified without the consent of the defendants." And paragraph 13 said: "The defendants object to the bringing of this action against them by the plaintiff company and submit the same is entirely without precedent and will contend at the trial: (*a*) That this Court has not having regard to the matters hereinbefore mentioned and to the provisions of the Judicature Acts and the rules of the High Court made thereunder any jurisdiction to make the declaration prayed for herein. In the alternative: (*b*) That the Court in the exercise of its discretion ought not to make the said declaration, but that the plaintiff company should be left to establish their defence (if any) before the special tribunal entrusted with the determination of the question involved in pursuance of the statutes in that case made and provided subject to their right of appeal to a Divisional Court of the High Court of Justice provided for by s. 45 of the Judicature, 1873, the decision of which said Court is by s. 47 of the said statute made final and without appeal." The matter now came before the Court upon a summons to have the question of law raised by the defence decided before the action was further proceeded with.

By s. 3 of the Public Health (Buildings in Streets) Act, 1888, which repeals s. 156 of the Public Health Act, 1875, it is enacted as follows: "It shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street, nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same. Any person offending against this enactment shall be liable to a penalty not exceeding forty shillings for every day during which the offence is continued after written notice in this behalf from the urban authority."

Bosanquet, Q.C., *Macmorran, Q.C.*, and *R. C. Glen*, for the plaintiffs. It is objected that this Court has no jurisdiction. First, it is said that the Court cannot deal with the matter by declaration where no relief is claimed; but in the face of Order xxv., r. 5, it is now too late to raise that objection. Secondly, it is said that the Public Health (Buildings in Streets) Act, 1888, upon which the defendants are proceeding, gives jurisdiction to the magistrate, and that as that is the tribunal to which alone the urban authority can go, so also the plaintiffs cannot go to the High Court to obtain a decision upon their rights inasmuch as the matter is removed from the jurisdiction of the civil courts. But *Lord Auckland* v. *Westminster District Board of Works* (1), which was decided upon a similar clause in the Metropolis Management Amendment Act, 1862, is an express decision to the contrary, and is still a binding authority, notwithstanding the adverse comments upon it by Sir G. Jessel in *Kerr* v. *Preston Corporation* (2), which we submit are not justified.

In *Hendon Local Board* v. *Pounce* (3) and *St. George's Local Board* v. *Ballard* (4) the local board themselves took proceed-

(1) L. R. 7 Ch. 597, 603, 607.
(2) 6 Ch. D. 463.
(3) (1889) 42 Ch. D. 602.
(4) [1895] 1 Q. B. 702.

ings in the High Court to restrain the defendants from doing an act forbidden by the Public Health Act, 1875, the question being one of property right.

In *Robinson* v. *Barton Eccles Local Board* (1) and *Barlow* v. *Vestry of St. Mary Abbotts, Kensington* (2), no objection was taken to the jurisdiction; but it was assumed that the Court had jurisdiction under circumstances similar to those in *Lord Auckland* v. *Westminster District Board of Works*. (3)

If the plaintiffs were wrong on the merits, the cases above cited shew that the local board might bring them into the High Court, and we submit that there is equally jurisdiction for this Court to entertain an action by the plaintiffs against the local board in a case where they are right. To decide otherwise would lead to serious inconvenience, because no proceedings can be taken before the magistrate until the building is up; and, therefore, the plaintiffs, in order to obtain a decision upon their rights, must first have incurred the expense of putting up the building.

It may be that we could not obtain an order to restrain the defendants from proceeding before the justices; but that is very different from saying that this Court has no jurisdiction to determine our rights in this action, which was commenced before any proceedings were taken before the justices.

It will perhaps be contended that the matter is res judicata; but a court of summary jurisdiction is not a court of record, and the fact that an inferior court which has jurisdiction to determine the question at issue has given its decision does not amount to res judicata.

Here we claim a declaration of right; and we submit that we are entitled to it, although no specific relief is asked, and none could be obtained.

[They also referred to Kerr on Injunctions, 3rd ed. p. 2.]

C. E. Jenkins, Q.C., and *H. Courthope-Munroe*, for the defendants. Notwithstanding the terms of Order xxv., r. 5, this Court has no jurisdiction to make the declaration asked for, no consequential relief being asked for: *Austen* v. *Collins*. (4) The declaration is sought for as a means of restraining the defendants from taking proceedings before the justices: *Baxter* v. *London County Council.* (1) As to such cases as *Hendon Local Board* v. *Pounce* (2), we admit that the defendants in addition to their right to proceed before the justices might sue for an injunction; but if they do not choose to do that, the plaintiffs have no right to bring them to this Court.

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(1) (1883) 8 App. Cas. 798.

(2) (1886) 11 App. Cas. 257.

(3) L. R. 7 Ch. 597.

(4) (1886) 54 L. T. 903.

In *Lord Auckland* v. *Westminster District Board of Works* (3) the defendants had threatened to put their powers in force and pull down the plaintiff's building if he erected it beyond the building line; but here the plaintiffs have erected their building, and then come to the Court for a declaration. That case was, moreover, observed upon by Jessel M.R. in *Kerr* v. *Preston Corporation* (4) We also rely upon *Stannard* v. *Vestry of St. Giles, Camberwell* (5), which was a similar case. Such an action as this is not maintainable unless the Court can give consequential relief.

[STIRLING J. Why should any limitation be placed upon the rule? The jurisdiction is, of course, to be exercised with care.]

The rule was not intended to introduce a new form of action. The meaning of it is that the Court may make a declaration in any action which could have been maintained before the passing of the rule, or in respect of which there was then existing jurisdiction. No case can be conceived in which the discretion of the Court ought to be more carefully exercised than such a case as this.

In *In re Mills' Estate* (6), it was held that Order LXV., r. 1, the words of which are as wide as possible, did not enable the Court to order costs to be paid by persons who, before the Judicature Acts came into operation, could not have been ordered to pay them. See also *Brooking* v. *Maudslay* (7) and *Baxter* v. *London County Council* (1), in which the decision of Day J. must have been based upon similar reasons.

(1) (1890) 63 L. T. 767, 771.
(2) 42 Ch. D. 602.
(3) L. R. 7 Ch. 597.
(4) 6 Ch. D. 463.
(5) 20 Ch. D. 190.
(6) (1886) 34 Ch. D. 24.
(7) (1888) 38 Ch. D. 636.

We submit, moreover, that, the exact point in this action having been decided by a court of exclusive jurisdiction, this action cannot be maintained: *Reg.* v. *Hutchings* (1); *North-Eastern Ry. Co.* v. *Dalton Overseers.* (2)

Bosanquet, Q.C., in reply. The criticisms of Jessel M.R. upon *Lord Auckland* v. *Westminster District Board of Works* (3) are no doubt valuable, but they do not affect the authority of that decision of the Court of Appeal.

In *Stannard* v. *Vestry of St. Giles, Camberwell* (4), the facts were very different. Here we ask the Court to decide our rights on the question of property—a question which could not be dealt with by the magistrates.

There is no estoppel in this case, nor can the plea of res judicata be successfully urged. The magistrates have only decided a question of fact. They cannot decide the question of the application of the statute so as to bind all other courts. *In re Mills' Estate* (5) was decided upon a question of costs, and has no application to this case.

Upon the plain words of the statute and the whole course of the authorities, I submit that the Court has full jurisdiction to make the declaration asked for, and the discretion of the Court ought to be exercised in this case.

Cur. adv. vult

June 14. STIRLING J. (after stating the facts). The question is, Ought I to allow this action to go on? The statement of claim and the writ simply ask for a declaration without any other relief whatever. The form of the action is sought to be justified by an appeal to Order XXV., r. 5: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not." Now, the last sentence of that rule is expressed in the very widest terms. It is said, however, that these wide words must be read with some limitation, and it is suggested that the Court has no authority notwithstanding that rule to make a declaration in a case in which whether before or after the Judicature Act no relief could be given by the Court. I am not called upon, it seems to me, to decide on this occasion whether any such limitation is to be read into the rule. I am not satisfied in this case that there is an entire absence of jurisdiction to give consequential relief, at all events in the present state of the authorities.

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(1) (1881) 6 Q. B. D. 300.
(2) 14 Times L. R. 421.
(3) L. R. 7 Ch. 597.
(4) 20 Ch. D. 190.
(5) 34 Ch. D. 24.

Now, the material authorities appear to me to be three. The first is the case of *Lord Auckland* v. *Westminster District Board of Works*. (1) That arose, not under this Act, on which there appears to be no decision, but under the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102). That contained two clauses of a very similar nature to s. 3 of the Public Health (Buildings in Streets) Act, 1888. Sect. 74 provided for what I may call rectifying the general line of the street when buildings were pulled down, and it provided that it should be lawful "for the Metropolitan Board of Works to require the same to be set back to such a line and in such a manner for the improvement of any street as the said board shall direct; provided that the said board shall make compensation to the owner of such building for any damage and expenses which he may sustain and incur thereby." Then s. 75 was an enactment that "No building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintendent architect to the Metropolitan Board of Works for the time being; and in case any building, structure, or erection be erected or be begun to be erected or raised, without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the board of works for the district in which such building or erection is situate to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable, and shall also make an order for the payment of the costs incurred up to the time of hearing." The Westminster District Board of Works were taking or threatening to take proceedings before a magistrate under s. 75, and the contention of Lord Auckland, who was the owner of the lands in respect of which the proceedings were to be taken, was that the case fell, not within s. 75, but within s. 74, and Malins V.-C. and the Court of Appeal, consisting of James L.J. and Mellish L.J., were of opinion that the case did not fall within s. 75, but within s. 74, and consequently that a magistrate before whom a summons was taken out under s. 75 would have no jurisdiction whatever to deal with the case, that section not being applicable. Both the Vice-Chancellor and the Court of Appeal granted an injunction in very wide terms, which I have got before me, and which I think it is right to say, as it does not appear in the report, extended to restrain the board of works from taking any proceedings for the purpose of compelling the plaintiff or his builder, or any person employed by him, to abstain from erecting buildings on the land in question, and also to restrain the board, their attorneys, solicitors, and agents, from taking proceedings for the purpose of recovering from the plaintiff or his builders penalties under the Metropolis Management Amendment Act, 1862. The ground on which that is put by James L.J. is this (1): "The plaintiff, Lord Auckland, comes to this Court and complains that a public body threaten and intend, under colour of certain great powers given them by Act of Parliament, to take and pull down some buildings which he has a right to erect, and is about to erect, on his own property. He complains that by these threats they have embarrassed him in the application of his property to the purpose he desires, and have in fact prevented him from erecting his building, because they tell him in plain terms that if he does build they will put in force the powers of their Act, and pull down his building." Then he says: "It seems to me to be the same kind of case as those well-known cases in which this Court has exercised its jurisdiction by restraining railway companies from proceeding to take land which they had power to take for one purpose, for some other purpose for which they were not entitled to take it; or to take part of a house only, where the law obliged them to take the whole of it. In those cases the Court has stopped them at once and granted an injunction, because they were about to exercise their powers in a manner that was oppressive or in a manner that was illegal. I have no doubt therefore that this is a case within the jurisdiction of this Court, and that it is a case proper for this Court to decide once for all instead of obliging Lord Auckland to go before a magistrate and discuss before him the question of jurisdiction and the difficult construction of these Acts of Parliament, and then to carry the case to the Court of Queen's Bench by certiorari, or to take some other step to get it finally decided." Then Mellish L.J. says (2), after expressing the opinion that as regards the state of the building it was clearly within the 74th section, and the district board had no power to proceed under s. 75: "That being so, I am further of opinion that this Court has jurisdiction to grant relief in this case. The district board threatens that, if Lord Auckland should erect stables on this land, they will pull them down. It is true that they must first go before a magistrate. If they do he will probably tell

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(1) L. R. 7 Ch. 597.

(1) L. R. 7 Ch. 603.

(2) L. R. 7 Ch. 607.

them that he has no jurisdiction; for it seems to me perfectly clear that he has no jurisdiction under this section. But I think Lord Auckland is entitled to say, 'I will not wait to see whether a magistrate will decide rightly or wrongly as to his jurisdiction in this case; I will not go before a magistrate at all, but I will go into the Court of Chancery for an injunction to restrain you from pulling down my stables in a case where you have no power to pull them down.'" Certainly that is a decision, as it seems to me, of the Court of Appeal, consisting of two very eminent judges, that this Court has jurisdiction to grant an injunction in a proper case to restrain a public authority with power to sue for penalties from proceeding before the magistrate to recover those penalties. That decision has been criticised by Sir George Jessel, sitting as Master of the Rolls, in the case of *Kerr* v. *Preston Corporation*. (1) There he refused an application which was made by the plaintiffs, who were owners of a house, to restrain the corporation of Preston from taking summary proceedings before a justice of the peace for recovery of penalties under the Public Health Act, 1875, on the ground that the plaintiffs had set forward their building without written consent from the defendants under s. 156 of the Public Health Act, for which s. 3 of the Act of 1888 is now substituted. The Master of the Rolls said (2): "The first question is whether there is equity to restrain a proceeding of the kind now threatened. It is a criminal proceeding instituted by information in the usual way, and seeking to recover a penalty for a breach of certain laws which are sanctioned by the Legislature. Why ought a Court of Equity to interfere with the ordinary proceedings of a criminal court? I am not aware that any such power exists. The point came before me in *Saull* v. *Browne* (3), where I declined to interfere with criminal proceedings or to follow Lord Hardwicke's doubtful decision in *Mayor of York* v. *Pilkington*. (4) My decision was appealed from, and the Lords Justices thought it a right decision. With the exception of that case before Lord Hardwicke, there is no instance in which a Court of Equity

(1) 6 Ch. D. 463.
(2) Ibid. 466.
(3) (1874) L. R. 10 Ch. 64.
(4) (1742) 2 Atk. 302.

has interfered in criminal proceedings. I do not say that the Court might not interfere in a possible case, but as a general rule it will not. Then I come to the question whether there is any equity at all. Now I have been referred to the case of *Lord Auckland* v. *Westminster District Board of Works* (1), and speaking with all deference to the eminent judges who decided it, it appears to me that sufficient attention was not paid to the real facts of that case. The Lords Justices dealt with the case as if the Westminster Board of Works had threatened to pull down what they had no right to pull down, and, that, being a wrongful act, they felt no doubt as to their jurisdiction to restrain it. If that had been the case here, I should, without that decision, have granted an injunction, just as in the case of a railway company exceeding its powers. But on reading the report, that was not the real state of the case at all. The Westminster Board of Works had not threatened to pull down the houses, but to apply to a magistrate for an order to pull down, and such an order could not have been made except by a magistrate, having jurisdiction to make it; so that the application was really to restrain the board not from pulling down—as both the Lords Justices treated it—but from applying to a magistrate for an order to pull down. Consequently the judgment in that case has in fact no real application to the present case." Then the Master of the Rolls goes on to say that there was nothing in the shape of acquiescence which could preclude the corporation in that case. From the report, I infer that the Master of the Rolls had the case as reported in the Law Reports (1) before him, but I do not know that he was aware of the form of the order as it appears in the registrar's book which was actually made in Lord Auckland's case. I confess it does seem to me that at all events to the mind of Mellish L.J. the point was present, and I have little doubt that it was also present to the mind of James L.J. However, the criticisms of a judge no less eminent than the members of that Court of Appeal are of great weight, and of course weight must be given to them in any consideration of the subject; but this remark is to be made—that Sir G. Jessel, sitting as Master of the Rolls, and not in the Court of Appeal, could not overrule the decision in *Lord Auckland* v. *Westminster District Board of Works.* (1)

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(1) L. R. 7 Ch. 597.

Now, the third case with which I have to deal is the subsequent one of *Stannard* v. *Vestry of St. Giles, Camberwell.* (2) That again was a case in which there was an application of a similar character to this, though not precisely the same. It related to a question with regard to a drain. There a dispute had arisen between the local board and the builder about a drain which the builder in the course of erecting some buildings interfered with, and they gave notice to him that they would enter upon his land and reinstate the drain. They afterwards abandoned that intention, and took proceedings against him before the magistrate. The plaintiff then brought an action against the defendants, claiming an injunction to restrain them from trespassing on his land and from proceeding against him before the magistrate. In the statement of claim the plaintiff did not in terms allege that the defendants threatened and intended to trespass on the land; and it was there held by the Court of Appeal that, as no intention to commit a trespass was proved or alleged, the plaintiff had not made out his case for injunction upon a trespass, and, that being so, the Court had no jurisdiction to restrain the proceedings before the magistrate. I have read that from the head-note, but perhaps it goes a little beyond the judgment which was given in the Court of Appeal. The facts must be taken to be that the local authority in that case simply threatened to proceed before the magistrate. They did not threaten to take the law into their own hands and to enter upon the plaintiff's land, and to make any alteration in the drain. Sir George Jessel, who presided in the Court of Appeal, said (3): "There is no allegation that that is a fact, and I believe the truth was that such an allegation could not be made. I think the defendants are right when they say that they did not intend to enter upon the land. But, whatever the effect of the notice of the 17th of May might have been, that course of proceeding was not one the defendants ultimately intended to adopt; and, indeed, the notice of the 24th of

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(1) L. R. 7 Ch. 597.
(2) 20 Ch. D. 190.
(3) 20 Ch. D. 195.

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October, in my opinion, shews that clearly. However, the allegation is not there, and, as I said before, though the notice of the 17th of May, standing alone and without any further proceeding or any further explanation, would have been strong evidence of intention, it does not appear to me that there is here either sufficient allegation or sufficient evidence of intention on the part of the defendants to enter upon the plaintiff's land and commit a trespass. That would dispose of the case so far as the question of trespass is concerned; but the plaintiff goes on to ask an injunction to restrain the defendants from taking any proceedings before the magistrate. Now, as a general rule, it is quite plain you cannot do that. Where the Legislature has pointed out a mode of proceeding before a magistrate it is not, as a general rule, for another Court to interfere to stop that proceeding by injunction." Then he goes on to discuss *Hedley* v. *Bates* (1), where he himself, sitting at the Rolls, had granted an injunction in a case in which he considered the magistrate had no jurisdiction. It is to be observed that in that case the proceedings before the magistrate had taken place, and they had been decided adversely to the plaintiff in that case, and thereupon the Court refused to interfere. Upon that ground both the Master of the Rolls and Sir James Hannen, and the present Master of the Rolls, proceeded in this case of *Stannard* v. *Vestry of St. Giles, Camberwell* (2); but they did not profess to overrule the decision in *Lord Auckland* v. *Westminster District Board of Works.* (3)

Now that being the state of the authorities, I do not think it would be right for me to say that there is absolutely no jurisdiction in the Court to restrain proceedings before the magistrate. In this case, as in the case of *Stannard* v. *Vestry of St. Giles, Camberwell* (2), there is no evidence, indeed there is no allegation in the statement of claim, that the defendants threaten or intend to enter upon the plaintiffs' lands in any way; and it was admitted by the plaintiffs' counsel that the allegations in that respect could not be improved or added to. They simply shew an intention to proceed before the magistrates, as indeed

(1) (1880) 13 Ch. D. 498.
(2) 20 Ch. D. 190.
(3) L. R. 7 Ch. 597.

is also shewn by the correspondence to which I have called attention. There is, therefore, no ground for the interference of the Court upon the footing that the defendants threaten or intend to do any illegal act. All that it is shewn they threaten or intend to do, and that which they have done, is to proceed before the magistrates in the way which is pointed out by s. 3 of the statute.

Now, whether or no there be jurisdiction in the Court to restrain by injunction such an application, it seems to me that the granting of an injunction in such a case is a matter which ought to be done with the greatest possible caution, and I respectfully adopt the language of the Master of the Rolls in that case: "Where the Legislature has pointed out a mode of proceeding before a magistrate it is not, as a general rule, for another Court to interfere to stop that proceeding by injunction." I desire to add that in contests between local authorities and private owners it seems to me that that rule ought to be adhered to somewhat strictly. In these matters as to building lines the Legislature has provided a cheap and short mode of obtaining a decision on the point in question, and it would be a matter of regret if a different and more expensive mode of obtaining a decision were to be habitually resorted to, or resorted to in the absence of very special circumstances. I confess my own experience, sitting here as a judge, leads me to believe that vestries and other local authorities are sometimes too ready to embark in costly litigation without any equivalent benefit to the public or the ratepayers whom they represent; and I should be sorry if either private individuals or public authorities were, when a cheap and speedy mode of settling a dispute is provided by the Legislature, to resort to a more expensive one. I think, therefore, that, in the exercise of the discretion which is vested in the Court, it ought, even as regards the granting of an injunction, to be very slow to grant an injunction against taking proceedings before the magistrate when the Legislature has pointed out that as the proper mode of proceeding; and a fortiori it seems to me that when the Court is simply asked to make a declaration of right, without giving any consequential relief, the Court ought to be extremely cautious in making such a declaration, and ought not to do it in the absence of any very special circumstances. [His Lordship then considered the question whether upon the materials before him any special circumstances were shewn, and continued :—]

This is a case in which, in the exercise of its discretion, the Court ought not either to interfere by way of injunction or to make a declaration in accordance with the prayer in the statement of claim, but ought to leave the matter to the decision of the tribunal which has been pointed out by the Act of Parliament. This will lead to an adjudication by a Divisional Court, as similar questions have already been decided by Divisional Courts on similar applications.

Jenkins, Q.C., then asked for an order under Order xxv., r. 3, dismissing the action with costs on the ground that the decision on the point of law substantially disposed of the whole action; and, upon counsel for the plaintiffs stating that they desired to put an end to the matter at once, his Lordship dismissed the action with costs.

Solicitors: *Bircham & Co.; Kent & Son.*

G. A. S.

HOPKINS *v.* HEMSWORTH.

KEKEWICH J.

1898

June 22.

[1897 H. 3855.]

Mortgage—Real Estate—Sub-mortgagees—Equitable Estates—Conflicting Equities—Notice—Priority.

An equitable sub-mortgagee by deposit made by a legal mortgagee of land has an equitable estate in land, and therefore, as between two such equitable sub-mortgagees, the doctrine of obtaining priority by notice does not prevail. Thus the equitable sub-mortgagee who is later in time does not obtain priority over the earlier by being the first to give notice to the original mortgagor.

In re Richards, (1890) 45 Ch. D. 589, considered.

By the marriage settlement, dated December 11, 1861, of Mr. and Mrs. Williams certain shares and reversionary interests of Mrs. Williams were conveyed to William Taylor and John Severn Walker upon certain trusts for the husband and wife and their children.

John Severn Walker survived his co-trustee and died on June 11, 1875, having appointed his widow, Ellen Barber Walker, and the plaintiffs his executors. Shortly after the death of J. S. Walker a mortgage debt of 500*l.*, forming part of the settlement funds, was paid off and was received by Richard Canning Hill, a solicitor in Worcester acting for Mr. and Mrs. Williams and their trustees. Pending the appointment of new trustees of the settlement, Mrs. Walker and the plaintiffs agreed that Hill should temporarily retain the 500*l.*, he securing the same with interest at 5 per cent. per annum by depositing with them certain mortgage securities belonging to him and of the documents of title relating to the property comprised therein. Accordingly, on December 8, 1875, Hill deposited with Mrs. Walker and the plaintiffs a memorandum of deposit of that date and the deeds and documents therein specified. The securities so deposited comprised a mortgage from one Wootton to Hill dated May 29, 1875, of two freehold houses in Worcester for 250*l.* and interest, a conveyance by Hill to Wootton dated October 25, 1875, of two other freehold houses in Worcester, and a mortgage dated October 26, 1875, by Wootton to Hill of the same houses for 265*l.* and interest. By the memorandum Hill acknowledged that the 500*l.* was in his hands pending the appointment of new trustees, and he undertook at any time when called upon to pay the 500*l.* with interest thereon at 5 per cent. per annum, and thereby indemnified Mrs. Walker and the plaintiffs against any loss in respect of the above investment of the 500*l.*

Mrs. Walker died on October 2, 1890.

Subsequently Hill obtained possession by fraudulent means of the deeds specified in his memorandum of deposit, and deposited the conveyance of October 25, 1875, and the mortgage of the following day, with the defendant Hemsworth as an equitable security for a loan of 200*l.* and interest, accompanied by a memorandum of deposit dated September 24, 1892, Hemsworth having no notice that the security was trust property, or of any claim by the plaintiffs. On March 20, 1895, Hemsworth gave notice of his equitable sub-mortgage to the executors of Wootton, the original mortgagor to Hill, Wootton being then dead. No notice of the equitable sub-mortgage of December 8, 1875, was ever given by the trustees of the Williams' settlement either to Wootton or to his executors.

On May 12, 1896, Hill, being insolvent, executed a deed of assignment of all his property to the defendant Hubert Aloysius Leicester upon trust for his creditors. In the investigations that then followed the facts of the case were disclosed, whereupon the plaintiffs gave the defendant Hemsworth notice claiming the benefit of the security deposited with him as being the trustees of the settlement and as having the prior equity thereto, and also requiring him to deliver up the deeds in his possession. He however refused to admit the plaintiffs' claim, and accordingly on November 16, 1897, the plaintiffs brought this action against the defendants Hemsworth and Leicester claiming (1.) a declaration that the plaintiffs were entitled to a first charge for their 500*l.* and interest on the mortgage of October 26, 1875, and on the documents of title relating to the property comprised therein, and on the moneys secured by the said mortgage, in priority to any claim by the defendants Hemsworth and Leicester respectively; (2.) an account of what was due to the plaintiffs in respect of the said charge, and that the said charge might be enforced by foreclosure or sale; (3.) an order on the defendant Hemsworth to deliver up the deeds in his possession relating to the said mortgage security; and (4.) a receiver.

The defendant Leicester in his defence disclaimed priority over the plaintiffs' security and all right of redemption. The defendant Hemsworth in his defence charged the plaintiffs with gross and wilful negligence and breach of trust in handing the deeds to Hill. He also alleged that he, Hemsworth, dealt with Hill in good faith and in the belief that Hill was entitled to deal with the deeds in the manner he did and to create a valid charge on them: and that it was through the plaintiffs' negligence and improper conduct in handing over the deeds to Hill that Hill was enabled to deposit the deeds with him, Hemsworth. He counter-claimed a declaration that he was entitled as against and in priority to the plaintiffs to the full benefit of his memorandum and deposit of September 24, 1892, and the charge thereby professed and intended to be created. In their reply and defence to the counter-claim the plaintiffs denied that they had been guilty of any negligence, breach of trust, or improper conduct, and stated that they handed over the deeds to Hill in perfect good faith and in the honest belief that he had authority to receive them.

The action now came on for trial. The only point in the case calling for a report was whether the defendant Hemsworth had, by giving notice of his equitable charge to Wootton's executors, obtained priority over the plaintiffs' equitable charge though of an earlier date, the plaintiffs having omitted to give any notice.

Warrington, Q.C., and *S. Dickinson*, for the plaintiffs. The contest here is really between two equitable sub-mortgagees, that is, two persons each having a charge on the mortgage security given by the original mortgagor to the original mortgagee, and the question is whether the sub-mortgagee who is subsequent in date to the other sub-mortgagee obtains, by reason of his having given notice to the original mortgagor, priority over the earlier sub-mortgagee who failed to give such notice. Both sub-mortgages are equitable sub-mortgages by deposit of a legal mortgage of freehold property. Each has a distinct estate in equity in the land itself, and not merely an interest in the money which is to be produced by sale or mortgage. In such a case the doctrine of obtaining priority by notice does not apply: *In re Richards*. (1) We submit, therefore, that we are entitled to priority, notwithstanding omission to give notice to the original mortgagor.

Renshaw, *Q.C.*, and *J. B. Matthews*, for the defendant Hemsworth. It is the original mortgage debt that is really and primarily charged or pledged by the equitable sub-mortgages. An equitable sub-mortgage is thus a mortgage of a chose in action, and in such a case the mortgagee who gives notice to the debtor thereby obtains a priority over an earlier mortgagee who has not done so: *Dearle* v. *Hall*, *Loveridge* v. *Cooper*. (2) In *Re Hughes' Trusts* (3) a charge on a portion secured on a term of years in land was treated as a chose in action, and not as in the nature of realty so as to exempt it from the doctrine of notice. And the doctrine is recognised in *Wigram* v. *Buckley*. (4) *In re Richards* (1) is not in point, for that was not a case between two equitable sub-mortgagees, but between an equitable owner of a mortgage, and a subsequent equitable sub-mortgagee of that mortgage.

The defendant Leicester was not represented by counsel.

KEKEWICH J. held first, upon the facts, that the plaintiffs had not been guilty of negligence, and proceeded:—There is a second point of some importance. It is said that notice of the equitable sub-mortgage of December 8, 1875, was necessary in order to perfect the security, and that the defendant having given notice to the executors of the original mortgagor, Wootton, was entitled to stand before the plaintiffs, who gave no notice. The distinction between equitable estates and

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(1) 45 Ch. D. 589, 595.
(2) (1823) 3 Russ. 1, 29, 30.
(3) (1864) 2 H. & M. 89.
(4) [1894] 3 Ch. 483.

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interests in land on the one hand and choses in action on the other for this purpose has been recognised in argument on both sides. The question is, To which class does a mortgage debt belong?

In *In re Richards* (1), Stirling J. reviews the authorities, and sums them up at the conclusion of his judgment as follows (2): "So that from the time of Sir W. Grant down to that of Lord Hatherley the rule with respect to mortgage debts has been, that as between the particular assignee and the assignee in bankruptcy the title of the particular assignee prevails, although no notice has been given to the mortgagor by the former." The distinction suggested between that case and the present is that Stirling J. was not dealing with two independent dealings with one mortgage by way of sub-mortgage; but his observation which I have read certainly covers that, and in my opinion it would be mischievous to pare it down and not to extend it to the case now before me. Though such a case as this is, so far as I am aware, not to be found in the books, yet it appears to me that it would be wrong to exclude it from the rule.

In my opinion the equitable estate created by a deposit of title-deeds is equally an estate in land for this purpose, whether it is directly created by an original mortgagor or derivatively through an intervening mortgagee by way of sub-mortgage. We are therefore dealing here with equitable estates in land, and where you are dealing with equitable estates in land the doctrine of obtaining priority by notice does not prevail, and on that ground I decide in favour of the plaintiffs.

There must accordingly be a declaration that the plaintiffs are entitled to a first charge upon the mortgage of October 26, 1875, and the documents of title relating to the mortgaged property and on the moneys secured by that mortgage, in priority to any claim by the defendant Hemsworth.

Solicitors: *Janson, Cobb, Pearson & Co., for Hughes & Brown, Worcester; A. Hunt, for R. A. Essex, Worcester.*

G. I. F. C.

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(1) 45 Ch. D. 589.

(2) 45 Ch. D. 597.

KEKEWICH J.

1898

July 6.

In re RATCLIFF.

[1898 R. 807.]

Judicial Trustee—Application by Beneficiary—Sole Executor—"Trustee"—Administration—"Trust"—Reversioner—Remuneration of Trustee—Discretion of Court—Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 1, *sub-ss.* 1, 2, 4.

A person interested in an estate is not entitled as of right to the appointment of a judicial trustee under the Judicial Trustees Act, 1896, but the appointment is, under s. 1, sub-s. 1, a matter entirely within the discretion of the Court.

Thus where the reversioner under a will applied under the Act for the appointment of a judicial trustee to act either alone or jointly with the testator's widow, who was sole executrix and also tenant for life (there being no trustee appointed by the will), the Court refused the application, as it was opposed to her wish and to the testator's manifest intention, which was that she should have the sole control of his estate, there being, moreover, no ground of complaint against her: nor was the fact that the applicant offered that the remuneration of the judicial trustee, when appointed, should come out of capital and not out of income held to justify the application.

Under s. 1, sub-s. 2, of the Act the administration of the property of a deceased person is a "trust" and the executor is a "trustee"; so that, under sub-s. 1, the Court can, in a proper case, remove the executor and appoint a judicial trustee in his place, to whom, under sub-s. 4, it can give directions as to the administration of the trust.

ADJOURNED SUMMONS.

Robert Ratcliff by his will dated July 11, 1891, and drawn in a very informal manner, gave and bequeathed all his property, both real and personal, to his wife Hannah Jane Ratcliff for her life, and appointed her his sole executrix. And he directed that after her death the sum of 1000*l*. should be paid to his cousin Anthony Rowley. And he directed the payment of numerous other legacies, and appointed Joseph Nixon "residuary legatee after all the legacies are paid after my wife's death." No trustees were appointed by the will, neither did it contain any power of appointing trustees, nor any investment clause. The testator's widow survived him and proved the will on November 12, 1897.

On May 9, 1898, Joseph Nixon, the residuary legatee, took

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out the present summons under the Judicial Trustees Act, 1896, against Mrs. Ratcliff, the widow, asking that a certain gentleman, a solicitor, might be appointed a judicial trustee jointly with Mrs. Ratcliff, or, in the alternative, as sole trustee.

As there appeared to be some doubt whether the Court would appoint a solicitor as trustee under the Act, application was made to the Law Guarantee and Trust Society, who thereupon consented to act as trustee. The summons was then, by order, amended by inserting the words "or some other fit and proper person or company." The summons was supported by a written statement filed by the applicant under the Act, from which it appeared that the testator's property was of the value of about 29,000*l.*, of which about 2500*l.* represented real estate. The personal estate, or the greater part of it, was represented by securities of a description not authorized by law as trust investments. The legacies given by the will amounted to about 9000*l.* Mrs. Ratcliff was aged about seventy-two, and it was alleged as a ground for the application that her age precluded her from attending to so large an estate, and that she was averse to any change being made in the existing insecure investments. The applicant expressed his willingness that the remuneration of the judicial trustee, if appointed, should come out of corpus and not out of income. He also stated, as "exceptional circumstances specially affecting the administration of the trusts," that without the assistance of the Court no trustees of the will could be appointed: that the will was informal throughout, and was almost certain to give rise to questions of construction, on which the opinion and direction of the Court would have to be obtained.

Buckmaster, for the applicant. The object of the application is to protect this estate, which is of large value, for the reversioner, the residuary legatee, by having the investments placed on a secure footing, most of them being of a description unauthorized by law as trust securities. The tenant for life is a lady incapacitated by age from giving her attention to the management of so large an estate; no one has any control of the estate but herself, and she is, moreover, averse to making the changes which are absolutely necessary in the investments. This therefore is a case in which the Court should exercise its discretion in appointing a judicial trustee under s. 1, sub-s. 1, of the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), which says that "Where application is made to the Court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the Court may, in its discretion, appoint a person (in this Act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shewn, in place of all or any existing trustees."

This lady is in the position of a single trustee, a position which the Court does not regard with favour; and it has long ago been decided that, where there is a single trustee of a trust fund, though appointed by a testator himself, the Court will, at the instance of a beneficiary, appoint an additional trustee: *Grant* v. *Grant*. (1) The applicant is willing that the remuneration of the judicial trustee should come out of corpus and not out of income, which should remove all objection on the part of the widow. I am simply asking for the appointment of some person whose action will be regulated by the Court at my expense.

Warrington, Q.C., and *J. G. Wood*, for the respondent, the widow. We object to the appointment of a judicial trustee as unnecessary. Everything that is necessary to be done can be done by the widow, the executrix, or in case of her death, by those claiming under her. There is no trust declared by this will. It is a simple legal devise. There is nothing but a direction to pay certain legacies and the appointment of a residuary legatee. After the widow's death the legacies can be paid by her representative or by the residuary legatee himself. If your Lordship should consider that the widow is in the position of a trustee, and that an additional trustee is desirable, the appointment can be made under the Trustee Act, 1893. At all events we submit there is no occasion for appointing a judicial trustee.

(1) (1865) 34 L. J. (Ch.) 641.

Buckmaster, in reply. The rules under the Judicial Trustees Act provide that a solicitor may be appointed; but if your Lordship declines to appoint a solicitor, then the Law Guarantee and Trust Society, who have consented to act, may be appointed, for the word "person" in the Act includes a corporation.

Kekewich J. As I understand this Act, it is, not only according to its true construction but in express terms, permissive only, and it leaves it entirely in the hands of the Court to exercise its discretion as to whether in a particular case there shall be a judicial trustee or not. Sub-s. 1 of the 1st section says this: "Where application is made to the Court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the Court may, in its discretion, appoint a person (in this Act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shewn, in place of all or any existing trustees." Probably, according to the true construction of this sub-section, there would have been a discretion in the Court even if the words "in its discretion" had been omitted. But the Legislature has thought fit to insert the words "in its discretion," so that the Court may consider in each case whether the case is a proper one for appointing a judicial trustee or not. In the present case I have no difficulty in saying that the discretion ought not to be exercised by appointing a judicial trustee if Mrs. Ratcliff desires that should not be done. She is sole executrix, but this is not conclusive against an appointment, because the Act provides by sub-s. 2 of s. 1 that "the administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this Act." Therefore, as I read the Act, it would be competent to me, where there is a sole executor, to say that there shall be a judicial trustee in addition to the existing trustee or to act as sole trustee, for sub-s. 1 says the Court may appoint a judicial trustee "either jointly with any other person or as sole trustee, and, if sufficient cause is shewn, in place of all or any existing trustees." That is to say, the Court can under this Act do what it could not do before—remove an executor, and sub-s. 4 shews that administration is part of the trust, for it says "the Court may, either on request or without request, give to a judicial trustee any general or special directions in regard to the trust or the administration thereof." Therefore the mere fact that Mrs. Ratcliff is sole executrix is not a sufficient answer to this application, and would not, by itself, preclude the discretion of the Court. But I have this consideration, that the testator intended, as far as he could, that his widow should control the estate. He had not sufficiently perceived that a great deal of what he intended, such as the payment of the numerous legacies, would have to be done after her death, but he could scarcely have supposed that she was to wholly administer his estate. Mr. Warrington suggested that the legacies would be paid by some one entitled to the corpus of the estate, as, for instance, by some one taking by administration after the widow's death or by Mrs. Ratcliff's own executor and successor. I do not think the testator thought of that at all. He could not have contemplated or intended that his widow should pay the legacies, because they are to be paid after her death. But then the law has introduced into this will provisions which are not expressed, such as directions respecting investment. I will assume that there is no gift to the wife in specie and that therefore there ought to be realization of such of the securities as are not of a trust character. That ought to be done now: that is not the duty of the widow as executrix, but it is her duty in her character of trustee. It is merely to realize such investments as are not trust investments, to see that investments are in proper names, that proper accounts are kept, that the dividends are paid to the proper persons during their lives, and so forth. Should that induce me to appoint a judicial trustee? The Legislature has thought fit to say that a judicial trustee shall only be appointed where the Court thinks it desirable, and has not said that it is the right of a person interested in the estate to have a judicial trustee appointed at once. We have not got so far yet. I cannot accede to Mr. Buckmaster's argument without assuming that, whenever a person interested in an estate comes here without having any ground of complaint against the existing trustee, and whether the tenant for life wishes it or not, the Court ought to exercise its discretion by appointing a judicial trustee. I find no such expressions in the Act. Therefore, in my opinion, the proper thing to do in this case is to appoint an ordinary trustee who will work gratuitously and who will work harmoniously with the widow during her life. No trustee can be appointed here without the intervention of the Court, but the widow is sole executrix, and if she nominates a person against whom or against whose honesty nothing can be said, I think I ought to appoint her nominee. I may have, therefore, to send the case to chambers, and I must warn Mr. Buckmaster's client that if he proposes a person as trustee, though that person may be unexceptionable, he does so at his own risk as to costs.

Then Mr. Buckmaster says that the remuneration of the judicial trustee, if appointed, would come out of corpus and not out of income. I do not think that is an argument of sufficient weight in a case of this kind.

The order will be as follows: Amend the summons by intituling the application in the matter of the Trustee Act, 1893: declare that a trustee should be appointed under that Act: remit the summons to chambers to make the appointment, with an intimation that if Mrs. Ratcliff nominates a proper person her nominee should be accepted. Costs of all parties as between solicitor and client out of the estate.

Solicitors: *Merriman, White & Thomson; Ford, Lloyd & Co., for Toone & Bartlett, Loughborough.*

G. I. F. C.

C. A.
1898
June 7, 8, 9, 10.

ECROYD *v.* COULTHARD.

[1896 E. 464.]

Inclosure Act—Waste Land—Bed of River—Reservation to Lord of Manor—Territorial Rights.

By a private Inclosure Act, passed in 1796, an allotment was directed of certain waste lands in a manor, the mines, &c., being reserved to the lord, and the allotments were declared freehold of the allottees to all intents and purposes. There was a saving clause providing that nothing in the Act should affect the title of the lord to the mines or to the seignories and royalties, franchises and liberties incident to the manors, but that the lord, his heirs and assigns, should enjoy (inter alia) all piscaries, fishing, &c., which could or might be claimed by him or them as owner or owners of the soil of the moors, commons, and waste grounds, in as full, ample, and beneficial a manner to all intents and purposes as if the Act had not been passed. The waste lands were bounded on one side by the River E., and the soil of half the bed belonged to the lord. There was no evidence that any of the tenants had ever enjoyed any rights of fishing, or any other commonable rights, over any part of the bed of the river; but there was evidence that at the time of the passing of the Act the lord exercised and let to tenants the right of fishing over half the bed. The commissioners allotted to Leach a part of the waste called Edenbanks, described as bounded on the west by the river, and gave an acreage which was correct for the land if the half-bed was not included. In 1890 the successor of the lord granted to the plaintiff the right of fishing in half the river between two points lying above and below Edenbanks. The plaintiff brought his action to establish his right of fishing in front of Edenbanks, and a right of landing on Edenbanks for fishing purposes. The Leach family insisted that the allotment to Leach passed the soil of the bed ad medium filum, and that they had the exclusive right of fishing over so much as adjoined Edenbanks, and by counter-claim asked an injunction to restrain the plaintiff from fishing opposite Edenbanks, and from landing on Edenbanks for fishing purposes:—

Held, that as the half bed of the river had been enjoyed and let by the lord as a separate tenement up to the passing of the Act, and the commoners had never exercised any rights of common over it, it did not form part of the waste lands which the commissioners were authorized to allot, and that even if they had expressly included half the bed in the allotment to Leach, he would have taken no interest in the bed, and that he had no right of fishing.

Held that, according to *Duke of Devonshire* v. *O'Connor*, (1890) 24 Q. B. D. 468, the saving clause in the Act did not reserve to the lord any merely territorial rights; and that as it did not appear that he had any franchise of fishing, his right to land upon Edenbanks for fishing purposes

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was a merely territorial right incident to his ownership of the soil, and was extinguished by the allotment.

Decision of North J., [1897] 2 Ch. 554, affirmed.

This was an appeal by the devisees of William Leach from a judgment of North J. declaring the plaintiff entitled to a several fishery in the eastern half of the River Eden so far as it adjoined the Edenbanks estate, and granting an injunction to restrain the defendants, their servants and agents, from entering and trespassing upon such fishery and interfering with the plaintiff and his tenants and licensees in the enjoyment thereof. The plaintiff gave cross-notice of appeal against his Lordship's judgment on the counter-claim granting an injunction to restrain the plaintiff, his servants and agents, from entering and trespassing upon the Edenbanks estate.

The Edenbanks estate was in the parish and manor of Cumwhitton, and adjoined the eastern side of the Eden, and until the award hereinafter mentioned was part of the waste of that manor.

In 1796 an Act was passed (36 Geo. 3, c. xxxix.), intituled "An Act for dividing and inclosing the moors commons and waste grounds in the manors and parishes of Cumwhitton and Cumrew within and parcel of the barony of Gilsland in the county of Cumberland." The Act contained recitals that "there are within the manors and parishes of Cumwhitton and Cumrew several moors, commons, and waste grounds, containing together 6000 acres or thereabouts; which said lands, in their present state, yield but little profit to the persons interested therein"; that Frederick, Earl of Carlisle, "is chief lord or lord paramount of the said barony of Gilsland, and of the said manors of Cumwhitton and Cumrew as parcel thereof, in which such moors, commons, and waste grounds are situate, and as such is seised of or entitled to the soil and royalties of the said moors, commons, and waste grounds, as being parts and parcel of the said barony, and also is owner or proprietor of certain messuages, demesne and other lands and tenements, within the said manors and parishes"; and that "the said Frederick Earl of Carlisle, and the several and respective persons, proprietors of lands within the said manors and parishes, entitled to right of common or otherwise interested in the said moors, commons, and waste grounds, are willing and desirous that the same should be divided, allotted, and inclosed in the manner hereinafter expressed; but such division, allotment, and inclosure cannot be effected without the aid and authority of Parliament." The Act then proceeded to appoint commissioners to make the inclosure in the usual way, and empowered them to sell so much of the moors, commons, and waste grounds as should seem sufficient to them by sale to raise money sufficient for paying their charges and expenses of and incidental to the Act. The remaining lands were to be allotted in severalty.

It will be observed that the recitals contain no reference to any right of common of fishery, and the Act in no way alluded to the River Eden. The Act contained a clause providing that nothing in the Act should affect that title of the Earl of Carlisle, lord of the barony of Gilsland and of the manors of Cumwhitton and Cumrew, his heirs or assigns, to the mines and minerals under the lands intended to be inclosed, or to the seignories and royalties, franchises and liberties incident and belonging to the said manors; but that the Earl, his heirs and assigns, &c., "shall and may, at all times for ever hereafter, have, hold, take, and enjoy all rents, services, courts, perquisites, and profits of courts and mills (except for the grinding and grist of malt), piscaries, fishing, hunting, hawking, and fowling, goods and chattels of felons and fugitives, felons of themselves and put in exigent, deodands, waifs, estrays, forfeitures, escheats, and all other royalties, liberties, franchises, privileges, pre-eminences, jurisdictions, and appurtenances whatsoever to the said barony and manors, or to the lord or lords, lady or ladies thereof for the time being incident, appertaining or belonging, or which have been anciently used, exercised, and enjoyed by the lord or lords, lady or ladies, of the same barony and manors (other than and except such right of common, pasturage, and free warren in respect of coneys, which is intended to be extinguished) as could or might be claimed by him, her, or them, as owner or owners of the soil of the said moors, commons, and waste grounds, in as full, ample, and beneficial a manner, to all intents and purposes, as he, she, or they could or might have held and enjoyed the same in case this Act had not been made."

The commissioners under the power given by the Act set out for sale three plots of land, one of which was the property now known as the Edenbanks estate. The commissioners sold this plot to William Leach, and gave him a receipt for his purchase-money on May 16, 1799. By their award dated April 13, 1801, they allotted this parcel to him, referring to it as distinguished in a plan annexed to the award, and as bounded on the west by the River Eden. The annexed plan shewed this plot as bounded on the north and south by lines running down to the edge of the river, but no further, and stated the area as 105A. 2R. 35P. If the lot extended to mid-stream the area would be from eight to ten acres more. William Leach died in 1839, leaving a will under which his widow Margaret Leach was tenant for life of Edenbanks. In February, 1896, she demised to the defendant Coulthard, honorary secretary of the Carlisle Angling Association, the exclusive right of angling in the half of the Eden which adjoined the Edenbanks estate. This claim was founded on the view that the Edenbanks estate extended to mid-stream.

The plaintiff claimed title under a deed of conveyance dated May 14, 1890, to himself from the Earl of Carlisle, by which the Earl conveyed (inter alia) "all that several fishery or exclusive right of fishing in that part of the River Eden which runs through the several parishes of Ainstable aforesaid and Cumwhitton, and extends" from Croglinbeck to Millbeck. This conveyance also comprised two properties called Ainstable Hall and Combs Wood, and the description of each contained the words "together with half the bed or soil of the River Eden where the same adjoins the same lands." There were no similar words in the description of the fishery. The plan upon this deed shewed the fishery to be over the eastern half of the river from Croglinbeck to Millbeck, and the deed contained a declaration that nothing therein should imply any covenant or warranty on the part of the Earl in relation to the title or further assurance of the said several fishery.

The Court considered it to be established by the evidence that at and for long before the date of the inclosure award the Earls of Carlisle were owners of the eastern half of the bed of the Eden throughout the manor of Cumwhitton, and had let the fishing over that half both above and below Edenbanks, and, there being no evidence that any one else had exercised a right of fishing there, the evidence appeared to justify the conclusion that the Earls had the right of fishing opposite Edenbanks. There was no trace of evidence that the commoners had ever claimed any right of fishing as one of their commonable rights.

North J. decided that the allotment to Leach did not pass the half bed of the river opposite Edenbanks, so that the title of the Earls of Carlisle to that half of the bed and their right to fish over it remained unaffected; that the grant to the plaintiff gave him a good title to exclusive fishery over it, and that he was entitled to an injunction to restrain the owners of Edenbanks from entering and trespassing upon such fishery, but that the plaintiff had no right of landing upon Edenbanks for the purpose of such fishery, and must be restrained by injunction from so doing.

The defendants the Leaches appealed from the decree affirming the plaintiff's right of fishing opposite Edenbanks and granting an injunction; the plaintiff appealed against the injunction restraining him from landing on Edenbanks.

Cozens-Hardy, *Q.C.*, and *Micklem*, for the defendants. The evidence, as we contend, does not shew that Lord Carlisle ever had any right of fishing opposite Edenbanks; and supposing he had, it was a mere territorial right, there being no suggestion that he had any franchise.

The saving clause in the Inclosure Act is identical with that considered in *Duke of Devonshire* v. *O'Connor*. (1) It is argued that this reserved to the lord a right of fishing; but the case just referred to shews that such a clause does not reserve any right merely arising from ownership of the land. Here the Earl had no right of fishing, only such right of fishing as every landowner primâ facie has over his own land covered with water. The half bed belongs to Edenbanks. In *Tilbury* v. *Silva* (1) Kay J. (2) says that a river running alongside the waste of a manor is part of that waste ad medium filum; and here there is no exception of the half bed nor of the right of fishing: *Ewart* v. *Graham.* (3) The commissioners, then, had power under the Act to deal with the half bed of the river. Could the lord under this award have shut out the allottees from the water? Suppose the lord of the manor had granted the mines under the wastes of the manor, surely the lessee could have worked them under the half bed. In *Lord* v. *Commissioners of Sydney* (4) it was held that a grant of land bounded by a creek extended ad medium filum, and so in a river: *Micklethwait* v. *Newlay Bridge Co.* (5), which is a very strong illustration of the strength of the presumption to that effect. Strong circumstances are necessary to rebut it.

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(1) 24 Q. B. D. 468.

[LINDLEY M.R. Here the question is whether the commissioners had any power to deal with the bed of the river.]

We say they had, for that it was part of the wastes of the manor, though there were no commonable rights over it, and they must be presumed to have intended to exercise it. It would be startling to say that the commissioners were bound to leave this strip outstanding in the lord.

[*Hindson* v. *Ashby* (6) was referred to.]

Some weight must be given to what has taken place since. The Leaches have fished in the river for trout and salmon without interruption, and have warned off trespassers. Lord Carlisle in 1889 put up property for sale in lots, describing lot 2 as a several fishery, giving the limits, and excluding the bed and soil except where the river adjoined property he was selling. This is an admission that he had not the soil. The fishery is stated in the conditions to be appurtenant to the manor of Ainstable. The reservation in the Act to the lord would not preserve him any right of fishery over land which vested in an allottee under the Act: *Sowerby* v. *Smith* (7):

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(1) (1890) 45 Ch. D. 98.
(2) 45 Ch. D. 110.
(3) (1859) 7 H. L. C. 331, 342.
(4) (1859) 12 Moo. P. C. 473, 496.
(5) (1886) 33 Ch. D. 133.
(6) [1896] 2 Ch. 1.
(7) (1874) L. R. 9 C. P. 524.

Duke of Devonshire v. *O'Connor.* (1) The presumption is that the right to fish belongs to the owner of the land abutting on the river: *Lamb* v. *Newbiggin.* (2) As to the claim to land on Edenbanks for the purpose of fishing, it lies on the plaintiff to make it out; the allotment was not granted with a reservation of any such right, and there is no authority that a right of fishing carries with it a right to land on the bank for the purpose.

Cripps, Q.C., Butcher, Q.C., and *Stuart Moore,* for the plaintiff. The commissioners had no jurisdiction to deal with the bed of the river, and there is nothing to shew that they intended to deal with it. *Duke of Devonshire* v. *Pattinson* (3) and *Beckett* v. *Leeds Corporation* (4) shew that the presumption of ownership ad medium filum may be rebutted if the circumstances shew that there was no intention to give the soil ad medium filum. How could the half bed be treated as part of the waste? It was not open, unoccupied land, for the fishing over it was actually let at the time of the inclosure. It was therefore a separate tenement. It was not part of the land over which the commoners had commonable rights, for there is no suggestion that any of the commoners as such fished over it. Inclosure Acts are passed for the purpose of dealing with lands over which the lord and his tenants have rights, and not with land over which nobody but the lord had any right. Then as to the cross-appeal.

[LINDLEY M.R. Has a person who holds a right of fishing any right to land upon the banks for the purpose of fishing when they belong to other persons?]

The reservation in the Act provides that the right of fishing shall be exercised in as beneficial a manner as before, which would not be the case if the owners of the fishery were prevented from going on the banks. The rights of fishing here mentioned are territorial rights, which distinguishes the case from *Duke of Devonshire* v. *O'Connor* (1), for that case related to a right of shooting, which might be a manorial right. Here the fishing must be territorial, for a man cannot have a franchise

(1) 24 Q. B. D. 468.
(2) (1844) 1 C. & K. 549.
(3) (1887) 20 Q. B. D. 263.
(4) (1872) L. R. 7 Ch. 421.

of fishing over his own land: see *Duke of Devonshire* v. *Pattinson.* (1) The reservation in the Act has an exception of some rights which are clearly territorial; therefore the reservation must include territorial rights. In *Lord Leconfield* v. *Dixon* (2) a very similar reservation to this in an Inclosure Act was held to reserve to the lord his territorial right of shooting game. In *Sowerby* v. *Smith* (3) the Act gave to the lady of the manor an allotment in satisfaction of all her rights in the lands except such manorial rights as were thereinafter reserved to her; so the reservation was naturally construed as extending only to manorial rights: see p. 532. The Act reserves fishing in as full a manner as it was before enjoyed.

[LINDLEY M.R. If the fishery is outside the Act, can you have in the Act a reservation of an incident to it?]

It was necessary to mention the fishery in order that it might be enjoyed in the same way as before. The enjoyment is reserved.

Cozens-Hardy, Q.C., in reply. We ask the Court to hold, as in *Attorney-General* v. *Hanmer* (4), that the waste is not confined to land over which the commoners have rights. A lease of all mines under the waste would have reached ad medium filum, and waste should be taken here as having the same extent. Then as to the counter-claim, the plaintiff claims a fishery. But Lord Carlisle never had a fishery; he only had a right of fishing as owner, and he walked over the banks as owner. He could grant a right of fishing; but a right of way along the bank is not an easement of necessity for its exercise, and you cannot in a grant of land imply any such reservation. There is no authority in support of the proposition that a person entitled to the bed of a river or to a right of fishery over it can go upon the banks for the purpose of fishing if they belong to other people. The reservation in the Act is invoked to secure to the Earl's grantees a benefit which he might have had by going on his own land. It cannot have any such effect. If he had claimed a franchise of fishery, other considerations might have applied.

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(1) 20 Q. B. D. 263.

(2) (1867) L. R. 3 Ex. 30.

(3) L. R. 9 C. P. 524.

(4) (1858) 27 L. J. (Ch.) 837.

Lindley M.R. This is an appeal from North J., who has decided that the appellant, who is the owner of some land called Edenbanks abutting on the River Eden, in Cumberland, is not entitled to the fishery in that half of the river which is adjacent to that piece of land. His Lordship has also decided against the plaintiff, who, according to that judgment, is entitled to the fishery there, that he is not entitled to exercise that fishery by landing when necessary on Edenbanks soil.

I do not propose to go through the facts with any minuteness, because, except on one point, I do not think they are seriously in controversy, and with that point I will deal presently. The indisputable facts at the time of the Inclosure Act, which is the time we have to consider, were these. The Earl of Carlisle was unquestionably the owner of half the bed of this river in the locus in quo and above and below it, and as owner of half the bed of the river he had the right to fish as incidental to the ownership of the soil. It is also beyond controversy that he was the lord of certain manors abutting on the river, including amongst others the manor of Cumwhitton and the other manor of which we have heard so much—Ainstable. There is a good deal of evidence, too, that in 1796, when this Inclosure Act was passed, he had let the fishery in this river both above and below Edenbanks, and was receiving rent for it. [His Lordship then stated his opinion that on the evidence as a whole he came to the conclusion that in 1796 the Earl of Carlisle had a right of fishing over the half bed of the river, including the part adjoining Edenbanks, and exercised it.]

The position of affairs when the Inclosure Act of 1796 passed was as follows. The Earl was the owner of the soil of the commons and waste abutting on the river, and he was the owner of the half bed of the river, having as such owner the right to fish in it, and to let that right to fish. Then comes the Inclosure Act, and the very first question we have to consider, and upon which in my judgment the whole case turns, is whether that Inclosure Act had any reference at all to the half bed of the river—whether, in other words, it was competent to the commissioners to deal with the half bed of the river. It strikes me that it was not, and that the Inclosure Act had no application whatever to the bed of the river. It would be a strange thing to hold that an Act of Parliament appointing commissioners to allot the commons and waste lands of a manor was intended to deal with the half bed of the river, unless there is something in the Act to shew it, when that half bed of the river was enjoyed as a separate piece of land, not as part of the common but as the separate property of the lord of the manor. But then it is said, "The law is that the owner of the land next to the waters of the river is primâ facie the owner of half the bed of the river. Therefore, if waste land abuts on the water of the river, that waste land extends, or at all events primâ facie extends, to the middle of the river," and reference is made to *Attorney-General* v. *Hanmer* (1), in which it was decided that a Crown grant of minerals under the waste of the manor includes the minerals under the foreshore. I do not dissent from that case; but what we are dealing with is not a grant, but an Inclosure Act, and the idea is wholly new to me that it is the object of an Inclosure Act to deal with any property whatever except property over which there are some common rights. I do not mean to say that you cannot find in an Inclosure Act special clauses relating to lands over which there are no commonable rights, as there are in this Act about mosses, and of course any express sections must have effect given to them; but you approach an Act of this kind with a presumption against the commissioners having anything to do with lands over which there are not some rights of common; and I am not aware of any case in which an Inclosure Act has been held to extend to land over which there are no commonable rights, unless there is some very special clause in the Act. Here, instead of finding anything which points to the bed of the river, we find that the respondent's whole case turns on the supposed presumption that the bed of the river is part of the waste. In one sense it may be waste land; but it is certainly not waste land to be inclosed. It is contrary to common sense, and there is no law in favour of it. It is said, however, that there is some authority for it. That the owner of the soil next the river is primâ facie owner of half the bed is true enough, and that of course applies to Lord Carlisle. There is no legal decision that I know of which lays down that commoners who have rights of pasture, or turbary, or other commonable rights up to the edge of the river have any rights in the river. To say that it is waste of the manor is a play upon words. It is a strip of land covered with water over which there are rights excluding all common rights, and to treat that as part of the waste of the manor seems to me to be utterly wrong. As to the passage in Kay J.'s judgment in *Tilbury* v. *Silva* (1), he says this: "I take it that this river was probably a river running along the waste of the manor, and therefore waste of the manor ad medium filum on the Chilbolton side; and just as a copyhold tenant by custom had a right of common upon the waste of the manor on the Chilbolton side of the river, so by custom he may possibly have had a right of fishing. I do not say whether he had or not—it is not material for me to decide that point—but I will assume it. It seems to me that, if he had it, he had it as a customary right." Of course, if the waste of the manor was bounded by a river and there was evidence that by custom the commoners had a right to fish in the river, I should take it to be part of the waste in the ordinary meaning of the expression; but if you find that the commoners' rights do not extend beyond the water's edge but are confined to the terra firma, it seems to me wrong to say that the half bed of the river which was enjoyed by the lord, and which was a part of his demesne, is to be treated as part of the waste. If once you get the fact that this is not part of the waste for the purposes of the Inclosure Act, Mr. Cozens-Hardy's case necessarily fails, because it has never been alleged that the defendant has any right to fish in this river, unless he has got the half bed of the river as part of the land awarded to him under the Inclosure Act. Now, the award, if looked at apart from the legal doctrine to which I have been adverting, is entirely against the defendant, for it is an award of so many acres of land bounded on the west by the River Eden, and this corresponds to the admeasurement of the land he has got. I am of opinion then, that the legal doctrine relied on by the defendant does not entitle him to more than is allotted to him; he must have what

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(1) 27 L. J. (Ch.) 837.

(1) 45 Ch. D. 110.

is so allotted and no more. I think, then, that North J. is right in saying that the defendant did not acquire by the award any right to fish in this river.

The cross-appeal raises an entirely different question, and, to my mind, a much more difficult one. The plaintiff is a lessee or grantee of the right of the fishing in this river. It is in evidence that the stream is full of holes, and that although it can be fished by wading you cannot fish everywhere in that way, and that there are places where, if you are to fish at all, you must get out and stand on the bank and fish off the bank. The plaintiff's contention is that inasmuch as he is entitled to the fishery of half the river, he is entitled to get out, land upon, walk upon, and fish from, the banks of the Edenbanks land. This turns upon whether Lord Carlisle, who, as I have said already, is or was entitled to the fishery in the river, had any right after the award under the Inclosure Act to get out, land upon, and walk upon the banks of lands which had been allotted. I am bound to say that, if the case were free from authority, I should think there was great difficulty in construing the saving clause of the Act upon which this part of the case really turns. Apart from that clause, the legal aspect of the matter is simple enough. The Edenbanks land has been sold and allotted to the defendant by the commissioners without any reservation of right. It is his own freehold and subject to no reservation of rights of way or anything else. Primâ facie, therefore, the defendant has a right to exclude Lord Carlisle and his lessees just as much as anybody else. But the saving clause unquestionably presents difficulties. It is not a new one: it has been commented upon before and judicially expounded in the case of *Duke of Devonshire* v. *O'Connor* (1), where the Court of Appeal held that a clause precisely the same as this in an Inclosure Act did not have the effect of preserving to the lord of the manor any rights which were merely territorial or incidental to his ownership over lands allotted, but only preserved manorial rights, or rights independent of those which he had formerly as owner of the soil. The right there in question was the lord's right of sporting over the waste of the manor.

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He had that right of sporting as owner of the soil, for I take it that every lord of a manor can shoot over his own waste so long as he does not interfere with the tenants' right of common. The question there was whether, having regard to the language of the saving clause, the lord of the manor had lost his right of sporting over lands which had been allotted without any statement that they were subject to any right of sporting, and it was held that he had. [His Lordship here read the saving clause in the Act.] Applying that clause to a right of shooting over the inclosed land, the Court of Appeal, after reviewing all previous decisions, held in *Duke of Devonshire* v. *O'Connor* (1) that the right was not reserved.

I do not pause to criticise that decision. I accept it, and I am unable to draw any valid distinction between that case and this. I am unable to see any distinction material for the purposes of this decision between the right of shooting over the allotted land and the right of landing and walking for fishing purposes over allotted land, and if one is not preserved by the saving clause I fail to see on what principle the other can be. According to that decision, which I take as a guide, the clause preserves no rights which were enjoyed by Lord Carlisle simply as owner of the soil allotted, but is confined to those rights which were vested in him or enjoyed by him in another capacity.

Let us see then to what the Earl's right to land upon the banks of Edenbanks before the Inclosure Act is to be attributed. He was the owner of the soil, and had the right to land there—a right incidental to ownership of the land. If it could be shewn that he had landed there by some other title, by some franchise of fishing, it would have been totally different. If he had enjoyed the right to land as grantee of a right of fishery, as distinguished from his right to fish as the owner of the bed of the river, I should think that the saving clause would have preserved that right; but his right to land as owner of the banks on which he used to land is extinct by the allotment of the soil on which he used to land for fishing purposes. That disposes of the plaintiff's appeal.

In my opinion the view taken by North J. was right on both points.

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CHITTY L.J. I am of the same opinion.

On the defendant's appeal the critical question is whether the land covered by the water of the River Eden up to the middle of the river was or was not part of the commons, wastes, and moors within the meaning of the Inclosure Act. The defendant claims in respect of what is in terms an allotment, and he took simply through the powers conferred on the commissioners under the Inclosure Act. He claims the soil of the river up to the middle of the stream as land covered by water, which he says passed to him by virtue of the receipt and the subsequent allotment to him. His case depends entirely upon the supposition that half of the river was parcel of the waste land. As against that, the plaintiff has shewn that Lord Carlisle was the owner of the soil in half the bed of this river from a point far above to a point far below the place now in controversy, and was the owner of the soil in the half bed opposite the defendant's purchased close. It appears to me to be a question of fact whether a river running through a waste, or a river running by the side of a waste, is or is not part of the waste. In my opinion, in this case Lord Carlisle owned this bed of the river as a separate tenement; and I am much disposed to think (although it is not necessary for my judgment that I should be correct on this fact) that he did enjoy this by letting the right of fishing to tenants and in receiving a rent. Starting from this, is there or is there not enough to rebut the presumption—if there be such a presumption—that the half of the soil of the river is part of the waste? I think that where it is shewn that it was enjoyed as a separate tenement the presumption is rebutted. Had it been shewn that the tenants of the manor had rights of common over this water, such as is the right of piscary, then the question would have stood differently; but it is clear upon the evidence that there was no such right of any kind vested in freeholders or copyholders of the manor.

I now approach the Inclosure Act, and it seems to me a strange thing to say that an Inclosure Act (having regard to what the objects and purposes of Inclosure Acts are) should include one-half of the river which is separately enjoyed by

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the lord. The object of Inclosure Acts, as is always shewn by the preamble, is the general advantage of having waste land cultivated, and also to divide lands in which there are diverse and common interests—using the word in the popular sense—vested in many persons, and to overcome the impossibility of bringing so many persons together and of coming to an agreement as to how the commonable land shall be divided. In this Act it is said that there are within the manors of Cumwhitton and Cumrew (another manor which is not the subject of the present discussion) several moors, commons, and waste grounds containing 6000 acres or thereabouts, "which said lands in their present state yield but little profit to the persons interested therein." Now, as far as I have gone, there was one person, and one person only, who was interested in the soil of this half of the river, and that was Lord Carlisle himself. Then there comes the other recital, which is a common one, that the lord and the persons proprietors within the manors entitled to rights of common, or others interested, are willing and desirous that the same should be divided and inclosed; but that this cannot be done without the sanction of Parliament. We get in these two recitals the key to the whole Act; and it runs throughout the Act from beginning to end that there is to be a division of the land amongst the persons interested according to an equitable arrangement or distribution of the land to be made through the medium of the commissioners. The Act nowhere mentions the River Eden. There is, as the Master of the Rolls has pointed out, a special section as regards mosses; but that does not in any way point, in my opinion, to the object of the Act being any other than that which I have mentioned. No doubt there were questions with the proprietors of the mosses as to their boundaries, and this was the reason that they fell within the scope of this Act, that their boundaries might be ascertained by the commissioners. I think that it would be unwarrantable to say that this Act, without one word to that effect, was founded upon the presumption—if presumption there be—that the waste, the freehold and soil of which, of course, is in the lord, included the soil and the freehold of the lord of the manor with reference to the river over which no commonable rights were exercised. I agree, then, with the judgment of North J. upon this point.

Then, in regard to the cross-appeal, I think that the case of *Duke of Devonshire* v. *O'Connor* (1) applies to this case. The saving clause, which presents many difficulties, having in that case received judicial construction from the Court of Appeal, I do not propose to discuss it.

The plaintiff claims no franchise; he claims the right of fishing in the river in respect of the Earl's title, which title, it is admitted, was only a territorial title; in other words, Lord Carlisle had a right of fishing in the river simply because he was owner of the bed of the river. Then Lord Carlisle also was owner (subject to the commoners' rights) of part of the banks; but by far the greater part of them were held by persons who were not in any way subject to the Inclosure Act. The plaintiff's case is that the territorial right of fishery which he claims is outside the Act altogether. Then that being so, and the plaintiff claiming no franchise, he turns to the words of the saving clause, and says that although the half of the river was outside the Act of Parliament, yet the Act says that Lord Carlisle and his successors may enjoy the fishery in as beneficial a manner as if the Act had not been passed. They put their case in this way. The Act says to the lord, "You may enjoy your fishery which is outside the Act in as beneficial a manner as if the Act had not been passed," and then the plaintiff says that the right to come along the bank for the purpose of fishing is incidental—to what? Well, not to the right of the owner of the soil to the water, but they say that it is an incidental right as distinguished from a freehold interest in the land itself. Now, I have not found any evidence that those who claim under the lord at any time asserted or exercised a right to go along the banks where the ancient inclosures are. It is plain, therefore, that the lord exercised, so far as the defendant's property is concerned, his right of walking along the bank (which I assume in favour of the plaintiff that he and his tenants of the right of fishing did) in virtue of his ownership of the soil of the river. The result of that, therefore, is that they claim this as a right

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in the face of the section upon which the case of *Duke of Devonshire* v. *O'Connor* (1) turned, namely, that the allotments were to be freehold to all intents and purposes—a clause which it is not disputed applied equally to the land which was purchased by the Leaches.

Now, according to the considered judgment of the Court of Appeal in *Duke of Devonshire* v. *O'Connor* (1), the provision that the fishery should be enjoyed in as beneficial a manner as before the award would not preserve a right to come over the land allotted. There was an elaborate argument presented to us for the purpose of making a distinction between fishing and shooting, but I am unable to see that any distinction can be made in point of law. Shooting primâ facie is a territorial right. There may, indeed, be a royal franchise in the hands of a subject with a right to shoot over another man's ground, but primâ facie a man's right to shoot over his own ground is a mere incident to his ownership. And so it is with regard to fishing, and I know of no authority (and had there been any I am sure it would have been cited to us) that the mere right to the bed of the river, with the incidental right as part of the ownership of fishing in that river, carries with it a right to walk along the bank when belonging to other persons. Anybody who knows the river Thames would be rather surprised to hear that the right of fishing gave a right of going upon the nice grass banks that he sees upon the river.

I sum it up in this way. The plaintiff has not shewn that his predecessors in title at any time before the passing of the Inclosure Act exercised a right in the nature of the right claimed. I agree that what is claimed is not an ordinary right of way. What is claimed is claimed as incidental to the fishery, but no authority has been cited to shew that there is such an incidental right. There being no special right of fishery, no right over the banks could be attributed to a grant by the owners of the bank in former days. The lord having exercised his right of going on the banks merely in virtue of his ownership of the soil, it appears to me that North J. came to the right conclusion, and that the decision of the Court of Appeal

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in *Duke of Devonshire* v. *O'Connor* (1) excludes such a claim as the plaintiff makes by his cross-appeal.

COLLINS L.J. I am of the same opinion. The defendants here claim to be the owners of half the bed of the river in question under an allotment made by the commissioners under an Inclosure Act. Now, it is obvious that they can take nothing that the commissioners had no power to bestow upon them, and we must look, therefore, to see what it was that the commissioners were empowered to deal with. What they were empowered to deal with was "several moors, commons, and waste grounds containing together 6000 acres or thereabouts, which said lands in their present state yield but little profit to the persons interested therein." That presupposes a common interest by several persons in all the subject-matter of the inclosure. It is contended by the defendants that half the bed of the river comes within that description, and that therefore the commissioners had power if they so intended to grant half the bed of the river as well as the admittedly waste land adjoining it.

Is then half the river bed capable of being described in the circumstances of this case as part of the waste? It seems to me that it is not; primâ facie, it is not to be supposed that a river capable of being used and enjoyed for fishing purposes was part of the waste because it happened to be the boundary of the waste. Is there any presumption that a river forming the boundary of a manor is as to the extent of half its bed of different characters according as it passes by waste land or by old inclosures, freehold or copyhold? I should have thought there was no presumption of the kind; but it is not necessary to deal with that in this case, because even if under certain circumstances land covered with water bordering the waste of the manor might be waste, it seems to me that in this case there is abundant evidence that this half bed, this strip of land covered by water, was occupied by the lord exclusively for his own profit. We have conclusive evidence of dealing with the river for his profit both above and below the point in question. It

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is a continuous strip of land, and if there were no evidence of the actual user of the intermediate part by him or his tenants for the purpose of fishing, I think he might be presumed to have the same right over it; but I think myself that the fair inference from the facts that have been brought before us is that he did exercise rights of fishing by himself or his tenants upon the intermediate part as well as the two parts where there is complete evidence that he let the right of fishing. That being so, it seems to me that the land covered by water in this case was not within the power of the commissioners, and that no rights in respect of it were taken by the allottees.

Then comes the cross-appeal. The lord is the owner of half the bed of the river at the point in question; he was also, until the allotment, owner of the waste, subject to the rights of the commoners, and I will assume that he, for the purposes of convenient fishing, used to walk upon the bank now the property of the defendant. Has that right been preserved to him? It seems to me that it has not. This case is argued, as indeed it must be argued in this Court, on the basis that the decision of the Court of Appeal in *Duke of Devonshire* v. *O'Connor* (1) is good law. That case was decided upon the terms of a clause in an Act of Parliament identical with the saving clause in the present case. It was there held that under that clause, manorial, as distinguished from territorial, rights were alone preserved, and therefore there is no territorial right reserved to him over the land allotted. Mr. Butcher is obliged to admit that, but says, "Although I cannot claim that any right incident to my ownership in the nature of fishing is preserved to me by this section, I do say that the words in it that the piscary is to be enjoyed in as full, ample, and beneficial a manner to all intents and purposes as it was enjoyed before are large enough to carry a right to the same measure of enjoyment and use of the fishery as I had before the award"; that is to say, that the mode of enjoyment of a fishery not affected by the Act is preserved, although it is over the land allotted free from all common rights or obligations other than those named. Let us test that on the words of the Act itself. What is it that on

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the hypothesis is saved to the lord of the manor here? It is—I need not read the other words—"piscaries which he or they as owners of the soil, of the moors, commons, wastes, may enjoy in as full, ample, and beneficial a manner to all intents and purposes as they could or might have enjoyed the same in case this Act had not been made." What piscaries are those which they may enjoy? Obviously, piscaries in respect of some manorial right or franchise, if such can exist—it is assumed in this case that such can exist; but if they can exist those are the piscaries which can be enjoyed in this ample manner. When you examine that, you find that the words entitling the lord to enjoy in as full and ample a manner are the words limiting it to the piscary reserved—that is to say, to a manorial piscary, and not to a right of fishery by virtue of ownership of the soil. It follows, therefore, that no right is reserved by the statute; and if it is not reserved by the statute, it is clearly gone by the allotment. Therefore I am clearly of opinion that the cross-appeal must fail.

LINDLEY M.R. Both appeals will be dismissed with costs, which will be set off one against the other.

Solicitors: *E. Flux & Leadbitter, for Dobinson & Watson, Carlisle; Harrison & Powell, for S. G. & G. F. Saul, Carlisle.*

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In re CHARLES WILLIAM HYLTON, EARL OF SEFTON (A PERSON OF UNSOUND MIND).

Lunacy—Jurisdiction—Conditional Devise to Lunatic—Resettlement of Lunatic's Estate—Election—Performance of Condition by Committee—Statute De Prerogativa Regis (17 *Edw.* 2, *c.* 10)—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 108 *sub-s.* 2, 117, 120, 124.

A lunatic can accept a devise imposing an onerous condition if it be for his benefit so to do.

In considering whether or not it is for the benefit of a lunatic to comply with a condition, the Court should act for the lunatic as if he were a person of sound mind and guided by reasonable motives.

The main purpose of the Act De Prerogativa Regis is to preserve the lands and tenements of a lunatic, and the provision therein restricting alienation ought not to be construed as prohibiting the Court from giving up, on behalf of a lunatic, an interest in his real estate in order thereby to preserve or to acquire for him a larger and more beneficial interest.

The jurisdiction of the Court in Lunacy is not confined to the cases enumerated in the Lunacy Act, 1890, and the specific provisions in Part IV. of the Act are enabling and not restrictive clauses.

The object of s. 124 of the Act is to remove any possible doubt as to the jurisdiction of the Court to order subsidiary acts to be done when exercising its statutory jurisdiction.

A lunatic entitled to a base fee in estate C. had other lands of value devised to him for life with remainder to his issue in tail on condition that he should within a certain period resettle estate C. to the uses of the devised estates.

In the opinion of the Court it was for the benefit of the lunatic that the condition should be performed:—

Held, that although the statutory powers conferred by the Lunacy Act, 1890, did not in terms authorize the Court to direct the committee of the lunatic's estate to elect on behalf of the lunatic in such a case, the Court in Lunacy had under its general jurisdiction power to direct the committee to perform the condition on his behalf and to resettle estate C., and under the circumstances ought to exercise such power notwithstanding that the resettlement of estate C. would cut down the interest of the lunatic therein.

WILLIAM PHILIP MOLYNEUX, 4th Earl of Sefton, who died in June, 1897, was, under a settlement made upon his marriage in July, 1866, tenant for life of certain estates called the Croxteth estates, of which the net rental was about 30,000*l.* a year. During his lifetime his eldest son, Charles William

Hylton, Viscount Molyneux, who was tenant in tail in remainder, disentailed these estates so far as he could do so without the consent of his father as protector of the settlement, and thus acquired a base fee therein.

The late Earl was also absolute owner of other estates called the Sefton estates, the net rental of which was about 21,000*l.* a year. By his will, which was dated January 28, 1893, the late Earl devised the Sefton estates (subject to a term of 1000 years to trustees upon certain trusts) to Viscount Molyneux and his two younger brothers, the Hon. Osbert Molyneux and the Hon. Richard Molyneux, as successive tenants for life with remainders to their issue respectively in tail male after the determination of the respective life estates with divers remainders over. And the testator directed that every person who under his will should become entitled (subject to the term of 1000 years) as tenant for life or in tail male by purchase to the possession of the estates thereby devised, and who should also become entitled as tenant in tail male or in tail, whether by purchase or descent, to the possession of the Croxteth estates, subject to the limitations of the marriage settlement, should, within one year after becoming entitled, both under his will and under the settlement, or, if an infant, within one year after attaining twenty-one, disentail the Croxteth estates, and resettle the same to the uses and upon the trusts by the will declared concerning the Sefton estates. And the will provided that if such person should refuse or neglect to comply with such direction, then, on the expiration of the year, the estate given to him by the will in the Sefton estates should cease and determine, and the said estates should go to the person next in remainder. The testator also empowered the tenant for life of the devised estates to appoint a jointure not exceeding 5000*l.*, or not exceeding 3000*l.* if no resettlement should be executed, and to charge portions for younger children; and bequeathed a legacy of 10,000*l.* to his eldest son, Lord Molyneux, if and when he should have executed the settlement of the Croxteth estates. And the testator directed that in that event his trustees should out of the income of his residuary personal estates pay the debts of Lord Molyneux, and the portions for younger children raiseable under the marriage settlement. And the testator gave his residuary personal estate upon the same trusts as the capital moneys arising under the Settled Land Act from the Sefton estates.

Some time after the date of the late Earl's will, in consequence of a serious accident, the faculties of Lord Molyneux became greatly impaired, and ultimately, shortly after his father's death, he was found lunatic by inquisition, and a committee of his estate was appointed.

In June, 1897, the late Earl died as above stated, and Lord Molyneux become 5th Earl of Sefton. It was said that he was now in very delicate health, and not expected to live many months, and that his debts amounted to about 31,000*l.*

This was a summons in the matter of the lunacy, taken out by some of the next of kin of the present Earl, asking that the committee of the estate of the lunatic might be directed, in the name and on behalf of the lunatic, to execute a settlement (pursuant to the will of his father) of the real estates comprised in the settlement executed on his father's marriage, in which the lunatic had, as above stated, a base fee. The master, not being satisfied that it was for the benefit of the lunatic that he should resettle the Croxteth estates, refused to make any order on the summons; the applicants appealed to the judge, and the matter was adjourned into court.

Farwell, Q.C., and *W. H. Cozens-Hardy*, for the applicants, the next of kin other than the next remainderman. Under the will of the late Earl of Sefton, the present Earl has to elect whether or not he will execute a resettlement of the Croxteth estates; and the question is whether the Court has jurisdiction, either original or statutory, to elect on his behalf and to direct the execution by the committee of the necessary deeds.

The Crown as parens patriæ has the care and custody of the persons and estates of those who are non compos mentis and incapable of taking care of themselves. This Royal Prerogative (though it previously existed) was declared by the Statute De Prerogativa Regis (17 Edw. 2), which was passed in 1324, and the jurisdiction of the Court is derived from the delegation of the Royal authority. We submit that the Court has jurisdiction to make this election.

[LINDLEY M.R. I suppose that there would be no question as to our jurisdiction to elect on behalf of a lunatic in the case of personal estate; but the difficulty here is that we are on behalf of this lunatic to give up land, and the Statute De Prerogativa Regis provides that the lands and tenements of lunatics "shall in no wise be aliened."]

We submit that the Court has general jurisdiction to do on behalf of a lunatic anything that is necessary to preserve the estate for his benefit. It will act solely and entirely in the interest of the lunatic himself, "and without looking to the interests of those who upon his death may have eventual rights of succession": *Oxenden* v. *Lord Compton* (1); *In re Marriott* (2); *In re Hewson* (3) It can direct the execution of a deed: *In re Drummond* (4); and bind the reversionary interest of a lunatic: *Wilder* v. *Pigott* (5); and act generally for the benefit of the lunatic: *In re Beridge.* (6) The Court will alter the property if the interest of the lunatic requires it; and will make "an election for the lunatic as he would have done if in his senses": *Ex parte Grimstone.* (7) It has been held that a fine levied by a lunatic stands good: *Mansfield's Case.* (8) See also as to the powers and duties of the committee of a lunatic's estate: 1 Collinson on Lunatics, p. 294; Shelford on Lunatics, 1st ed. p. 237; Pope on Lunacy, 2nd ed. pp. 160, 237.

Coming to the Lunacy Act, 1890, the Court is empowered by s. 108, sub-s. 2, to make orders as to the management of the lunatic's estate; by s. 117, to deal with or dispose of any property of his (inter alia) for the discharge of any incumbrance; by s. 120, to sell, exchange, and lease his property, to perform any contract entered into by him while sane, and to exercise any power or give any consent for the exercise of any power for his own benefit; and by s. 124, to direct the committee of the

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(1) (1793) 2 Ves. 69.

(2) (1808) 2 Mol. 516.

(3) (1854) 23 L. J. (Ch.) 256.

(4) (1836) 1 My. & Cr. 627.

(5) (1882) 22 Ch. D. 263.

(6) (1884) 50 L. T. 653.

(7) (1771) 2 Ves. 74; see note on p. 75.

(8) (1614) 12 Rep. 124; 5 Cruise Dig. 129.

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lunatic to execute and do any assurance or thing necessary for giving effect to any order made under the Act. We submit accordingly that the Court has jurisdiction in this case both original and statutory.

P. O. Lawrence, Q.C., and *Sargant*, for the committee of the estate of the lunatic.

Warmington, Q.C., and *Arkle*, for the Hon. Osbert Molyneux, the next remainderman. This is not a true case of election; and the Court cannot convey the legal estate in lands except under statutory powers enabling it in that behalf. By the terms of the Statute De Prerogativa Regis the alienation of land belonging to a lunatic is expressly forbidden. By chapter 10 of that Act the lands and tenements of lunatics are to be "safely kept without waste and destruction . . . . to be delivered unto them when they come to right mind; so that such lands and tenements shall in no wise be aliened." The Court has no inherent jurisdiction to sell the estate of a lunatic. This was held as to leasehold estate in *Ex parte Dikes.* (1) Neither does the Court act as the proprietor of a lunatic's property, but only as the guardian or administrator; and it does not, except in a modified sense, in the course of management change or alter rights in a lunatic's property: *Attorney-General* v. *Marquis of Ailesbury.* (2) Though the Court has power under its Lunacy jurisdiction to bar an estate tail, it is its duty so to exercise it as not to affect the rights of the remaindermen: *In re Pares.* (3) And if the Court were to direct the committee to elect on behalf of the lunatic in this case, and to disentail and resettle the estate in question, it would be greatly to the detriment of the remaindermen. This is not a case of sale or exchange. The Court is not asked to exercise its jurisdiction for the maintenance of the lunatic, nor for the payment of his debts or for any of the objects or purposes contemplated by the Lunacy Act, 1890. No section of the Act can be pointed out which confers upon the Court any statutory jurisdiction to make the order now asked for. And no decision has gone the length to which the applicants desire the Court to go.

(1) (1802) 8 Ves. 79.
(2) (1887) 12 App. Cas. 672.
(3) (1879) 12 Ch. D. 333.

[They also referred to *In re Harwood.* (1)]

[CHITTY L.J. referred to *Codrington* v. *Codrington.* (2)]

Farwell, Q.C., in reply, referred to *In re Montagu* (3), *Ardesoife* v. *Bennet* (4), and *Barrow* v. *Barrow.* (5)

LINDLEY M.R. We should have liked to have given more time to this case, but are hardly in a position to do so, because, if this election is to be made at all and this resettlement is to be executed at all, the matter must practically be carried through at once. Having had some opportunity of considering the case, I have come myself to a tolerably clear opinion that we have jurisdiction to make this order, and that we ought to exercise it.

I will not go through this very long will, but in substance the case stands thus. The Court has to consider what ought to be done under the following circumstances. Lord Sefton is, unfortunately, a lunatic; he is entitled to a base fee in certain estates called the Croxteth estates, which are of considerable value, and his father has by will settled upon him another large estate called the Sefton estate under certain conditions. Those conditions, so far as they are material for consideration, are these—that he shall resettle the Croxteth estate, and thereby cut down—not destroy, but cut down—his interest therein.

Now, first of all, bearing in mind that under his father's will he not only gets this large Sefton estate upon these conditions, but gets other benefits—namely, 10,000*l.*, and a very considerable income, out of which he can pay his debts, which amount to some 31,000*l.*—it is obvious to my mind that from the point of view which the Court would take in considering what ought to be done if this gentleman were in the least degree likely to live, and if he were actuated by those feelings which sons are or ought to be actuated by—namely, respect for his father's wishes—there can be no question at all that he would accept the Sefton estates upon the conditions on which they are devised to him. There are obvious family advantages in so doing—

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(1) (1887) 35 Ch. D. 470.

(2) (1875) L. R. 7 H. L. 854.

(3) [1896] 1 Ch. 549.

(4) (1772) 2 Dick. 463.

(5) (1858) 4 K. & J. 409.

keeping the two estates together, and so on—all of which have to be considered; and I am not at all prepared to say that it is the duty of the Court to look only to the question whether the lunatic gets a little more money or not. It is for his benefit unquestionably from the wider point of view to do what his father wished, and keep the two estates together; and it is also, in this particular case, unquestionably for his own pecuniary interest, because he would get a little more money if it is done. So far as his interest is concerned and so far as his benefit is concerned, I do not think that anybody studying the situation can doubt, unless he took a very narrow view indeed of the matter, that it is for the benefit of the lunatic that he should—I will not say elect between the two estates, but that he should perform the condition upon which alone he can obtain and keep the Sefton estate. I say "keep" because he has got it already under the will. He has a year to elect, and it is a question whether he is to lose it. He will lose it if he does not resettle and comply with the condition imposed by his father. That condition must be performed by the 27th of this month.

Now let us look at the matter apart altogether from the Lunacy Act, 1890. I will go by steps. Speaking generally, and without reference to the Statute De Prerogativa Regis, to which I will refer presently, I think that these propositions are elementary and beyond dispute. First, it is plain that a lunatic can accept a gift, or a bequest, or a devise of property, absolutely. Secondly, it is equally plain that a lunatic can accept a gift or a legacy upon conditions, provided that the gift on those conditions is for his benefit. I do not doubt that. Thirdly, that if the lunatic has property upon conditions, it is the duty of the committee to do all that is necessary to preserve the estate by performing the conditions if he can. That proposition I find laid down in Mr. Collinson's extremely useful book on lunacy at vol. i. p. 294: "If any part of the estate be liable to forfeiture, or held upon conditions, it is his duty, if possible, to protect it from the forfeiture, to satisfy the condition, and, when necessary, to apply to the Chancellor for directions." All that I take to be perfectly well settled.

Now, suppose that one of the conditions is, as it is here, that the lunatic shall give up some interest in real property which he is entitled to. The general principle would apply to that case. What is there to prevent its application? There is nothing that I know of in the statute law which prevents it except the provision in the old Act, De Prerogativa Regis. That Act has been construed in such a way as to prevent the Court from selling or mortgaging the estates of the lunatic for the purpose of raising money for payment of debts, even where the lunatic was in danger of arrest under a ca. sa. or was actually in prison. The Courts have gone that length. It is rather a narrow construction perhaps to put upon the Act, but the language of it is important. It follows a similar chapter about idiots. Chapter 9 of 17 Edw. 2, relating to idiots, says in substance that the Crown can take the profits of the idiot's land and keep the idiot's property, which means that provided the Crown kept the idiot properly all the rest of the revenue goes to the Crown. Chapter 10 relates to lunatics, and says just the reverse; it says that the Crown is not to take the lunatic's property and keep it for itself, but it is to apply it for the benefit of the lunatic and take care not to waste the lunatic's property. It runs thus—I will read the translation: "Also the King shall provide, when any (that before-time hath had his wit and memory) happen to fail of his wit, as there are many (per lucida intervalla) that their lands and tenements shall be safely kept without waste and destruction, and that they and their household shall live and be maintained competently with the profits of the same, and the residue besides their sustentation shall be kept to their use, to be delivered unto them when they come to right mind; so that such lands and tenements shall in no wise be aliened, and the King shall take nothing to his own use." "Residue" there obviously means the residue of the income of the landed estate; so that, if the lunatic recovers what income is not wanted for his maintenance and the maintenance of his house can be handed over to him, and if he dies it shall go to his executors or administrators in the ordinary way.

Now, in consequence of that language, "shall in no wise be aliened," the Courts have held that there is no power to alien even for the benefit of the lunatic; the object being to preserve the property for his benefit.

Let us apply that to this case. It appears to me that we shall be introducing for the first time a still narrower construction of the Act of Parliament if we say that under the stress of this Act, which was passed for a particular purpose, it is incompetent to the Court to sanction the giving up of a small piece of a lunatic's real estate in order to preserve a much larger piece. That would, I think, be a very narrow construction indeed to put upon the Act. If the Courts had put that construction upon it, then we should be compelled, of course, to adopt that construction. I quite agree, if it had not been for the modern Acts, we could not reverse the old decisions and hold that the Court had power to sell or mortgage land for the benefit of the lunatic in order to save him from imprisonment. It would be past praying for; but I am not at all disposed to press a very narrow construction beyond what is absolutely necessary.

It appears to me that we should be making a bad precedent if we were to say that this statute of Edward II., the object of which is to preserve the lunatic's estate, compels us to sacrifice a large estate simply because the lunatic could not keep it without parting with a small portion of another estate. I think so to hold would be an abuse of the Act, and not carrying it out according to its true intention.

Now if we have jurisdiction to decide that it is for the benefit of the lunatic that the committee should do that which is necessary to prevent the lunatic from being deprived of this large Sefton estate which he has got under the will of his father, it seems to me to follow as a matter of course that the Court has jurisdiction to order the committee to do for the lunatic whatever is necessary under the will of the father to comply with the conditions imposed upon him, and the performance of which his father directed.

Under these circumstances, and for these reasons, it appears to me, without invoking the Act of 1890 at all, that the Court has jurisdiction to do what is asked, and ought to exercise that jurisdiction.

I will say a word or two about the Lunacy Act of 1890. It was very strenuously contended by counsel for the applicants that there were sections in that Act which would authorize the Court to do this. But although one is naturally tempted to do that which one feels ought to be done, we should I think be making a bad precedent, and setting a bad example, if we strained the language of those sections so as to make them apply to the case. Having looked very carefully at them, I cannot bring this case within the language of any of the sections of the Act of 1890 without unduly straining them; and I base my judgment, therefore, upon the jurisdiction of the Court, which is not confined to the cases enumerated in the Act of 1890.

With respect to s. 124, on which so much stress was laid—"The committee of the estate . . . . shall . . . . execute and do all such assurances and things for giving effect to any order under this Act as the judge directs"—I do not think that would be of any assistance. It appears to me that it is put in in order to supply a possible defect, or to get rid of a possible doubt as to the jurisdiction of the Court to order subsidiary acts to be done when exercising a limited statutory jurisdiction; I look upon that as an enabling clause, not as a disabling one—as expressly recognising the power of the Court to do in detail that which the statute has authorized in more general terms. I cannot look on s. 124 as cutting down the power of the Court at all.

There will therefore be a declaration that the Court is of opinion that it is for the benefit of the lunatic that the conditions imposed by the will should be performed by the committee, and a direction that the committee shall forthwith execute the necessary deeds.

CHITTY L.J. I am of the same opinion. Upon the question whether it would be for the benefit of the lunatic to comply with the conditions contained in his father's will, I have no hesitation in stating my conclusion, which is that it would be for his benefit. I think we ought not in these cases simply to take the narrow view of what is the pecuniary benefit. We should act for the lunatic as if he was a person of sound mind;

and being a person of sound mind, he would be actuated, as a reasonable man, with a desire to comply with such a condition as this contained in his father's will. But passing that by, I am satisfied that in the worldly and pecuniary sense of the term it is for the lunatic's benefit. If he accepts the devise and complies with the condition, he will get a legacy of 10,000*l.*, and he will get his debts to the extent of 31,000*l.* paid. Without going through the other benefits which are dependent upon his accepting the devise and making the resettlement, I express again shortly my opinion that it will be for his benefit in every sense of the term.

Then what is the position of things? The lunatic has a base fee under the settlement, he having disentailed, so that his base fee in the Croxteth estates will endure so long as there is issue male of his body. The value of those estates is stated in round numbers to be 800,000*l.* or thereabouts. The Sefton estates which passed under the will of his father are again in round numbers stated to be of nearly an equal value. His father's will seeks to impose upon him a condition which he must comply with in order to get the benefit of the devises made thereby, namely, that he should resettle the lands in which he has this base fee, so as to make the Croxteth estate follow the limitations in the will of the Sefton estate; and those limitations are usual and ordinary and proper limitations, conferring upon the lunatic powers to jointure and to give portions to his younger children.

Nothing can be said adversely in a general way to the terms which a compliance with the condition will impose upon the present Earl. He cannot in any circumstances hold the entire interest which he has in the Croxteth estates and take the limited interest—the life interest—under the powers which I have shortly referred to in the Sefton estate. The case, therefore, is not simply one of aliening the lunatic's estate; but, looking at his real estate as a whole, it appears to me that what we are asked to do is, if possible, to give him the largest measure that he can, in the circumstances, obtain in the way of benefit in the real estate.

Now, this short statement brings me to the Statute De

Prerogativa Regis; but I premise that, as the Master of the Rolls has said, and as I have no hesitation in saying, a lunatic can accept a devise; and can accept a devise imposing an onerous condition, if the onerous condition be for his benefit; and whether it be for his benefit or not, it is for those entrusted with the care and custody of the lunatic under the sign manual to determine.

Then, coming to the Statute De Prerogativa Regis, it seems to me that the object of that statute was to preserve the lands for the benefit of the lunatic, and to prevent the lands from being wasted; and one method of dealing with lands which would not be for the benefit of the lunatic according to the statute is the alienation of them. But the whole statute is for the benefit of the lunatic; and I think with the Master of the Rolls that a somewhat narrow construction has been put upon that statute when it has been said that the lands could not be aliened by way of sale, even when it would be plainly for the benefit of the lunatic that such an alienation should take place. It is beyond question. The law is settled on this statute, and I do not propose to question the decisions that have passed upon it, but I think that they do not drive us to the extreme length that has been contended for by those who oppose this application. I deal with the real estate of the lunatic as a whole, and, in order to keep the greater, the better, and more valuable property for the lunatic, I think it is consistent with the language of the statute, and the true force and effect of it, that there should be jurisdiction in the King, and in those who are entrusted with the sign manual, to throw away the worse and less valuable part of the whole estate.

These constitute the short grounds upon which I think that we have, quite apart from the Statute of 1890, jurisdiction to elect in these circumstances for the benefit of the lunatic that he should take under the devise and comply with the conditions.

One word only about the Lunacy Act, 1890. I see no advantage in going through all the various sections to which we have been referred under Part IV. I state the sum of my opinion when I say that I think none of those specific provisions would apply to this particular case; but, at the same time, I think those specific provisions have not cut down, or in any way limited, the general jurisdiction to which I have already referred. As to s. 124, that in terms applies to orders made under the Act, and therefore would not apply to this particular case. But that is, as has been pointed out, an enabling section, and it does not cut down the right of this Court, where it has the jurisdiction, to give effect to that jurisdiction by directing that the proper conveyances in such a case as the present should be executed.

I do not think, although I have referred to it during the course of the argument, that it is necessary to pursue in any detail the question of the working by a court of equity of the jurisdiction in cases where it is simple equity that insists upon a man who takes under a will taking either against it or under it, which precludes him from approbating and reprobating; because, although that is an implied condition raised by equity, equity has worked it out in its own peculiar manner. In this case it is a condition binding at law; and the only possible suggestion that it appears to me could be made against the order which the Master of the Rolls has proposed would be, whether there is not a difficulty in giving legal effect to the order which we make; and it appears to me that if there were (as I think there is) general jurisdiction, it must carry with it all those accessory powers which would be necessary to prevent it being rendered futile. It must be within the competency of the Court to make this order an operative and binding order.

For these reasons I concur in the judgment of the Master of the Rolls.

COLLINS L.J. I am of the same opinion. I cannot doubt that if the lunatic were now in possession of his senses he would regard it as for his benefit, and, indeed, regard it as his duty, to make the election which the Court is now invited to make for him. It is only by taking the very narrowest view of his benefit, and also by assuming that there is no possibility of his recovery, that it can in any sense be said not to be for his benefit to make this election; and therefore, to begin with, I

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am quite satisfied that we are acting for the benefit of the lunatic, in the proper sense of the term, in making this election.

Now we have to consider, under what authority can that election be made? Having listened carefully to the arguments on the Lunacy Act, 1890, I am bound to say I was not satisfied that we had power to do it without unduly straining the words, possibly capable of bearing the meaning suggested, but only capable by twisting them from their natural meaning. But on the larger question of the jurisdiction under the Prerogative Act, I have not myself been able to entertain any doubt whatever that were we to refuse to exercise the option we should be defeating, instead of carrying out, the essential purpose of the Act; for when one looks at the Act, notwithstanding the somewhat narrow construction which has been put upon it in other cases, it is obvious that the purpose of the Act is to preserve this land and these tenements for the lunatic, so that they may be handed back to him upon his recovery, or may go where they ought to go after his death, the lunatic being maintained out of them during his lifetime. That is the provision of the Act. I can understand that, upon a narrow construction of that provision, alienation, even for the payment of his debts and for his benefit, might be disallowed, because it would have the effect of reducing the sum total of the lands. But what are we asked to do in this case? At the time that we are invited to make this election the lunatic is in this position: he has two estates in the aggregate of very considerable value. It is impossible for him, under the conditions under which he holds them, to safeguard the whole. A very large part—a much larger part—of that whole interest can be retained by sacrificing a limited interest in one of them than can be retained in any other way. Then if you have the statute, obliging you to safeguard the entire interest of the lunatic in lands and tenements, how are you to do it in such an event, when, if you do not elect he must lose some, and if you do elect he keeps more? It seems to me you are obviously fulfilling the Act, and not defeating it or departing from it, by exercising such an option. In fact, the only way in which you can carry out the simple provisions of the Act is by retaining as large a portion of the land and tenements as you possibly can.

Therefore, I have no difficulty on that part of the case. As to the machinery for carrying it out, it would be idle for me to pretend to give an opinion upon it; and I rejoice that my brothers, who know infinitely more about the technical difficulties, have been able to arrive at the opinion that this order may be made.

Solicitors: *Gedge, Kirby, Millett & Co.; Field, Roscoe & Co., for Gibbons & Arkle, Liverpool.*

W. W. K.

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June 14.

In re B. A. S. (A PERSON OF UNSOUND MIND NOT SO FOUND).

Lunacy—Person of Unsound Mind not so found—Person "lawfully detained"—Order appointing Receiver—Expiry of Period of Detention—Effect of—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 116, *sub-s.* 1 (*c*).

An order made by a Master in Lunacy under s. 116, sub-s. 1 (*c*), appointing a receiver and manager of the property of a person of unsound mind not so found, who at the date of the order was "lawfully detained" under a reception order, does not necessarily come to an end when the reception order expires and the person to whom it refers ceases to be lawfully detained; but a further order of the Court is required to discharge it, and the Court will not make such order unless satisfied that the person in question is no longer subject to the delusions which may have led to the detention.

On November 26, 1897, Master Bulwer made an order under s. 116, sub-s. 1 (*c*), of the Lunacy Act, 1890, appointing a person to receive and manage the property of B. A. S. This order was made upon the ground that B. A. S. was, at that time, "lawfully detained though not so found by inquisition" within the meaning of the section, under a reception order made by a magistrate upon two medical certificates.

The reception order afterwards expired, no further order had been made, and B. A. S. was no longer under detention.

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This was an application by way of summons taken out by B. A. S. that the order of November 26 might be discharged, on the ground that, the reception order having lapsed, she was no longer a person "lawfully detained," and was entitled to the control of her own property.

The matter, after having come before Rigby L.J. in the first instance and afterwards before Vaughan Williams L.J., was adjourned into Court.

Renshaw, Q.C., and *H. Tindal Atkinson*, in support of the summons. The order under which B. A. S. was detained has gone; she is no longer "lawfully detained." She is now free, and is entitled to have the custody and management of her own property. There must, no doubt, be an order discharging the receiver; but when lawful detention, which was the ground of the order, has ceased, statutory powers of management cannot be exercised any longer.

Warrington, Q.C., and *Methold*, for the official solicitor. The question is one for the discretion of the Court; but the language of sub-s. 2 of s. 116—that the powers made exercisable on behalf of the person mentioned in sub-s. 1 of that section shall be exercised until further order—seems to imply that a further order is necessary.

The Court then adjourned with the counsel engaged in order to consider a report which was not made public, and on returning delivered judgment.

LINDLEY M.R. I do not think we ought to accede to this application. I am clearly of opinion that when an order has been made within the jurisdiction conferred on the Judge in Lunacy by s. 116 it does not, ipso facto, come to an end by the circumstance that the person who was detained as a lunatic ceases to be so detained. On the true construction of this section and the various sub-clauses in it, it is necessary that some order of the Court should be obtained to discharge the receiver. To my mind it would be wrong in exercising Lunacy jurisdiction (which is an extremely difficult one) to discharge those orders unless the Court was satisfied that the lunatic is

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no longer subject to whatever delusions or hallucinations may have led to the lunacy. We are not satisfied about that in this case, and, therefore, we are not prepared to discharge the receiver.

CHITTY and COLLINS L.JJ. concurred.

Solicitors: *Munton & Morris; The Official Solicitor.*

W. W. K.

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MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY *v.* ANDERSON.

[1897 M. 1870.]

Railway Company—Purchase by Railway Company of Reversion on Lease—Covenant running with Land—Covenant for Quiet Enjoyment—Injunction—Damages—Compensation—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 6.

In 1893 an Act was passed enabling the plaintiff company to take compulsorily (inter alia) the property to which this action related. In 1894 the owner of the property let it to the defendant for a term of years by a lease containing the usual covenant for quiet enjoyment. In 1895 the company purchased the reversion of the property, subject to the lease. After this the company proceeded with their works, and in so doing caused structural injury to the defendant's house; they also for some time rendered the access to his premises less convenient, by erecting hoardings which blocked up half the thoroughfare along the street in which his house stood, and by taking a great number of carts along that street. They also for three or four days incumbered a passage along which he had a right of way so that he could not use it. It was not alleged that the company had exceeded their statutory powers or exercised them negligently. The company sued the defendant for rent, and he counter-claimed for damages for breach of the covenant for quiet enjoyment:—

Held, that the covenant for quiet enjoyment was in force and was binding on the company, and that they were liable to make compensation for any breach of it, but that no action would lie against them for any breach of it committed in the reasonable and careful exercise of their statutory powers, the only remedy of the tenant for such breaches being under the compensation clauses of the Railways Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation Act, 1845, and that the counter-claim, therefore, had been properly dismissed.

Though structural injury to a house by the lessor is a breach of the covenant for quiet enjoyment, no temporary inconvenience caused by the lessor, but not affecting the title or possession of the tenant, is a breach of the covenant.

Decision of Byrne J. affirmed.

By the Manchester, Sheffield and Lincolnshire Railway (Extension to London) Act, 1893 (56 & 57 Vict. c. i.), the company were empowered to make a certain railway, and to take compulsorily certain lands which included the property about which the present litigation arose.

On April 7, 1894, James Findlay demised to Anderson certain premises known as No. 1 in Goldhurst Terrace, Hampstead (a street running out of the Finchley Road), with a right of footway over a passage on the north-east side of the premises lying between the premises and some houses in the Finchley Road, for twenty-one years from March 25, 1894, at a rent increasing from 180*l.* to 250*l.* The lease contained a covenant by the lessor for quiet enjoyment in the usual form, limited to the acts of the lessor and persons claiming through him.

In 1895 the company purchased by agreement from Findlay his interest in the property; and by indenture dated October 7, 1895, he assigned it to them subject to the lease to Anderson.

In 1895 the company proceeded with their works, and in so doing caused by their excavations structural injury to Anderson's house. They also for some time rendered the access to his premises less convenient by erecting hoardings which blocked up half the public thoroughfare along Goldhurst Terrace. They also pulled down some houses in Finchley Road adjoining the north-east side of the right of way, and the lead from them was laid for three or four days on the right of way. Anderson also complained that a weighing machine was for two or three days placed so as to obstruct the way to his front door. Some noise and disturbance from the machinery and noise and inconvenience from the passing of carts employed by the company were also complained of.

The company sued Anderson for arrears of rent. He by his defence alleged that his lease contained a covenant for quiet enjoyment, and that the company as assignees of the reversion were liable to him for breaches of that covenant in an amount exceeding their claim. By counter-claim he alleged that the company had, contrary to the covenant for quiet enjoyment, entered upon the premises for the purposes of their undertaking, and had projected a tunnel partly under the premises, and had by their hoardings, machinery, and carts blocked the access to his said premises, and interfered with the use and occupation thereof.

The company by their reply denied that the acts complained of constituted any breach of the covenant for quiet enjoyment, and stated that they were done in exercise of their statutory powers.

The action was tried by Byrne J. The complaint as to projecting the tunnel was withdrawn. His Lordship decided in favour of the company both on the claim and counter-claim.

It was not shewn that the company in anything they had done had exceeded their statutory powers, or had exercised them negligently.

Anderson appealed.

Witt, Q.C., and *Arnold Statham*, for the appellant. The company have become assignees of the reversion on the lease, and they are liable to the appellant in damages for breach of the covenants for quiet enjoyment contained in the lease. The appellant does not base his claim against them upon the ground that they are tortfeasors, but upon the ground that, contrary to the covenant for quiet enjoyment, they have caused injury to the appellant's premises. But while the railway company seek to enforce the provisions of the lease in respect of payment of rent against the appellant as their tenant, they contend they are not as landlords liable to him upon the covenant for quiet enjoyment, and they import the Lands Clauses Consolidation Act into the relationship between them and the appellant, and say that his only remedy, if any, is a statutory one. The learned judge has decided in their favour mainly upon two authorities: *Kirby* v. *Harrogate School Board* (1) and *Clark* v. *London School Board*. (2) But neither of those cases cover the exact point here. *Kirby* v. *Harrogate School Board* (1) was the

(1) [1896] 1 Ch. 437.

(2) (1874) L. R. 9 Ch. 120.

case of a school board purchasing land which, in the hands of the vendor, was subject to a restrictive covenant, and the school board had the right to put an end to the covenant and to pay compensation. The position of a school board, as was said by Kay L.J. in that case, is materially different from that of a railway company, and the railway company here wish to keep the lease alive. *Clark* v. *London School Board* (1) was a case of a similar character. The present case is one of substantial injury to the appellant's house, and he is entitled to relief of some kind against the company: *Howland* v. *Dover Harbour Board.* (2) The works of which the appellant complains were not done by the company under compulsion, but voluntarily and for profit, and they have not been done with due regard to the appellant's rights. *The Metropolitan Asylum District* v. *Hill* (3) shews that, where the terms of a statute are not imperative but permissive, general powers should be exercised in strict conformity with private rights.

[CHITTY L.J. referred to *Baily* v. *De Crespigny.* (4)]

Moreover, the company, who now stand in the place of the lessor, are under an implied obligation not to derogate from his grant, and are liable for the nuisance they have caused: *Grosvenor Hotel Co.* v. *Hamilton* (5); *Duke of Buccleugh* v. *Metropolitan Board of Works* (6); *Sanderson* v. *Berwick-upon-Tweed Corporation.* (7)

Eve, Q.C., Hon. E. C. Macnaghten, Q.C., and *Sampson*, for the respondents. The covenants for quiet enjoyment contained in this lease were never intended to cover, and do not cover a case like this. The railway company are not the voluntary assignees of the covenantor. The taking by them of these lands was not foreseen at the time the lease was granted, and there has been no interruption by the railway company within the meaning of the covenant: *Harrison, Ainslie & Co.* v. *Lord Muncaster.* (8) All the acts of the company have been done in the exercise of their statutory powers, and without negligence. In *Jenkins*

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(1) L. R. 9 Ch. 120.

(2) (1898) 14 Times L. R. 355.

(3) (1881) 6 App. Cas. 193.

(4) (1869) L. R. 4 Q. B. 180.

(5) [1894] 2 Q. B. 836.

(6) (1872) L. R. 5 H. L. 418.

(7) (1884) 13 Q. B. D. 547, 551.

(8) [1891] 2 Q. B. 680, 685.

v. *Jackson* (1) dancing overhead was held to be a nuisance, but no breach of the covenant for quiet enjoyment. In *Robinson* v. *Kilvert* (2) it was held that heating the room below the room let to the plaintiff (a paper dealer) to such a degree that his brown paper was injured was not a breach of the covenant. But the substantial question is whether the defendant has chosen the proper kind of remedy. We say that the defendant's only remedy is under clauses 6, 16 of the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20). In *Ricket* v. *Metropolitan Ry. Co.* (3) it was held that temporary obstruction of a highway would not have been the ground of an action in default of statutory powers, and was not the subject of compensation. In *Caledonian Ry. Co.* v. *Walker's Trustees* (4) the cases are discussed, and it follows from them that apart from the covenant for quiet enjoyment this is not a case for compensation. [*Cessford* v. *Dover Harbour Board* (5) was also referred to.] There is no authority that a covenant for quiet enjoyment is broken by an impeding of the access; there is no breach unless access is taken away: *Andrews* v. *Paradise* (6); *Morris* v. *Edgington* (7); *Shaw* v. *Stenton*. (8) If persons acting under statutory powers keep within them and are not guilty of negligence, they cannot be sued. The Legislature has directed that the railway shall be made, and it may be made so long as the persons making it act reasonably; and they are not liable to be sued, though they are liable to the compensation clauses: *Rex* v. *Pease* (9); *Duke of Bedford* v. *Dawson* (10); *Kirby* v. *Harrogate School Board*. (11) A railway could not be made if all restrictive covenants were to remain in force so as to entitle the covenantees to injunctions.

Statham, in reply. It cannot be held that the covenant is gone; it does not entitle us to an injunction, but it is good for damages. A temporary partial obstruction is a breach of the covenant for quiet enjoyment: *Andrews* v. *Paradise*. (6)

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(1) (1888) 40 Ch. D. 71.
(2) (1889) 41 Ch. D. 88.
(3) (1867) L. R. 2 H. L. 175.
(4) (1882) 7 App. Cas. 259.
(5) (1878) *The Times*, April 2.
(6) (1725) 8 Mod. 318.
(7) (1810) 3 Taunt. 24.
(8) (1858) 2 H. & N. 858.
(9) (1832) 4 B. & Ad. 30.
(10) (1875) L. R. 20 Eq. 353.
(11) [1896] 1 Ch. 437.

[LINDLEY M.R. That was a way of necessity.]

If a good trade is destroyed by the acts of a company an action for damages must lie. [*Metropolitan Board of Works* v. *Howard* (1) was also referred to.]

LINDLEY M.R. In this case an action has been brought by the Manchester, Sheffield and Lincolnshire Railway Company against Mr. Anderson for rent under a lease, and he has put in a counter-claim asking for damages for breach of the covenant for quiet enjoyment contained in that lease. What we have to consider is whether Byrne J. was right in saying that no action will lie for the alleged breaches of that covenant.

In 1893 the Act was passed under which the railway company are making a railway; and on April 7, 1894, a lease was granted by one Findlay to the present defendant of a house and shop in Goldhurst Terrace, leading out of the Finchley Road, at the rent of 180*l*. a year for twenty-one years. That lease contained a covenant by the lessor in the ordinary form for quiet enjoyment by the lessee. The lease was not granted by the railway company; so no question as to its being ultra vires arises.

In October, 1895, the railway company bought up the reversion subject to the lease, and about the same time or a little afterwards they began to construct their railway in the neighbourhood of the defendant's house.

In the course of constructing their railway they have caused structural injury to the house, and have also more or less obstructed the public thoroughfare of Goldhurst Terrace; they have not completely obstructed it, but they have gone under the road and taken up half at a time, and worked under it in the usual way, leaving one-half accessible for carts and the other half blocked up. They have also in constructing their railway had a great number of horses and carts in front of the defendant's house, some forty in a day, and there has been a great deal of noise and disturbance made in front of the defendant's house, which has led, he says, to injury to his shop. In his lease he had a right of passage at the side of his house, and for two or three days it appears that was incumbered by bricks and rubbish, so that he was deprived of the beneficial use of it. It appears also that some weighing scales were put in the doorway of his house by people selling or removing lead. That is the nature of the acts which he says entitle him to bring an action in the High Court for damages for breach of the covenant for quiet enjoyment.

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(1) (1889) 5 Times L. R. 732.

Now, what is the answer to that, assuming those acts are proved? The question as to the weighing scales seems to be disposed of by the fact that they were not placed on the premises by the company, or their servants or agents. But all the other acts complained of were done by the company or their servants in the course of constructing these works. Then what the company say is: "All that we have done has been done in the exercise of our statutory powers; there has been no negligence in our exercise of them; everything we have done is authorized by statute, and you cannot bring your action against us for what we have so done. If you have any claim against us, your claim must be under the compensation clauses of the Railways Clauses Consolidation Act and the Lands Clauses Consolidation Act. You may be entitled to some compensation; but in any event this action will not lie." That is the view that Byrne J. has taken; and upon consideration I think that he was right, and that the action will not lie.

Let us see what is the effect of the covenant for quiet enjoyment upon the railway company. They have bought the reversion, and, like other assignees of a reversion, they are bound by the covenant, for it runs with the land. I do not see any reason for holding that the covenant has gone, or in any way been extinguished. The company must be bound like any other assignee of a reversion—it is not a question of obligation on the company, but a question of remedy. When we consider the remedy I fail to see the answer to the contention of the railway company. They say "You cannot bring an action against us on the covenant or otherwise for anything we are doing lawfully under our statutory authority." It is said that then the covenant is of no use to the defendant; but it is of very considerable use to him, for it may give him rights of compensation which otherwise he might not have. He may be able to prove, having regard to his covenant, that his land is injuriously affected when he could not prove it if he had no such covenant. Suppose, for instance, that this is a house less than twenty years old, and suppose the railway company had not bought the reversion, and that they made an excavation which let the house down, it is possible that letting it down would be no actionable wrong. But that could not possibly be the case where the company are bound by a covenant of this kind, because whether the house was new or old the assignee of the reversion could not lawfully let it down except under their statutory powers. The covenant, therefore, is by no means inoperative: it binds the company just as it would bind any one else. But when you come to the question of the remedy for an infringement of the covenant, you must look at the Act of Parliament. There may be other covenants binding on the company for breach of which an action might well lie, because a breach of them could not be attributable to the execution of the works authorized by the statute. Suppose, for example, there were a covenant by the lessor to keep the place insured. A breach of that covenant could not arise from the construction of the works under the Act. An action would lie against a railway company for the breach of a covenant like that, but for any breach of covenant that is authorized by the Act of Parliament there is no remedy at all except under the compensation clauses.

I will only add a few words about the covenant for quiet enjoyment because counsel for the defendant urged us to go to an extent rather alarming to real property lawyers. I take it that a mere temporary inconvenience caused by a lessor, not in depriving his tenant of a right of way, but in rendering his access less convenient than it was, is not a breach of covenant for quiet enjoyment. A temporary inconvenience which does not interfere with the estate or title or possession is not, to my mind, a breach of covenant, nor is there any case that goes anything like the length required to shew that it is. Even the judgment of Fry L.J., in the case that carried it farthest, *Sanderson* v. *Berwick-upon-Tweed Corporation* (1), in which he says that anything which substantially interferes with the enjoyment by the tenant is a breach of that covenant, must be taken with reference to the facts then before the Court, which were that water was poured on the land demised so as to interfere with the enjoyment of the demised property. It did not interfere with the possession, except in a very technical sense, and still less with the title. But to say that partly blocking up a public street, which is an inconvenience to the public and an inconvenience to any one residing near the place, is a breach of covenant for quiet enjoyment, is going far beyond any authority I am aware of.

It appears to me, therefore, that none of these things except the structural injury to the house are breaches of the covenant; but even if they are, the answer is that the acts done by the company are done under their statutory powers, and the remedy, if any, is compensation under the Acts.

The decision of Byrne J. was right, although there are some observations in his judgment about the covenant being gone which may be open to misconception. The appeal must be dismissed with costs.

CHITTY L.J. I am of the same opinion. The counter-claim of the defendant is founded solely on the covenant for quiet enjoyment. The covenant for quiet enjoyment was not entered into by the railway company themselves; but we have not to consider the question of whether they have bound themselves by contract or by conduct amounting to a contract not to exercise the powers of their Act. If we had to deal with a case of that kind different considerations would arise such as occurred in *Mulliner* v. *Midland Ry. Co.* (2) The railway company are liable under this covenant on the ground that it is a covenant the benefit of which runs with the land in favour of the assigns of the lease, and the burden of which runs with the reversion and affects the assigns of the reversion. The reason why the covenant runs is that it relates to the land, and it runs by reason of the privity of estate that exists between lessor and lessee. The principles of common law on this point are beyond dispute.

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(1) 13 Q. B. D. 547, 551.

(2) (1879) 11 Ch. D. 611.

But the railway company acquired the reversion in execution of the powers which were vested in them, not compulsorily, because they were not put by the owner of the reversion, the original lessor, to exercise their compulsory powers against him. The assignment was made in pursuance of an agreement with him, but that makes no difference.

Now, what are the acts complained of? I desire not to deal with this case too technically. The counter-claim alleges that the company have by their hoardings, machinery, and carts blocked the access to the defendant's premises and interfered with the use and occupation thereof. I agree with what the Master of the Rolls has said—that on a proper and reasonable construction of the covenant for quiet enjoyment the acts complained of are probably not breaches; but it is not necessary to decide that, because I am satisfied that the defendant has not proved any breach which would not be the subject of compensation under the Railways Clauses Act or the Lands Clauses Act.

What the railway company have done is in execution of the powers conferred on them by their Act. There is no question of their having acted in excess of their powers—there is no question of negligence on their part; and consequently in point of law all their acts are justified. That is a complete answer to the claim for damages.

The learned judge spoke of the covenant in language that might be interpreted to mean that it was altogether gone. In my opinion, if that was meant (I am not quite sure that it was) it would not be correct. I think the covenant still subsists, and on the question of compensation under the Acts the covenant can be legitimately taken into consideration. The covenant relates to the land, and that, as I have already said, gives the reason why it runs, and the statutes which relate to the injurious affecting of the land would, I think, well admit (indeed it was so held in one of the cases referred to) of the bringing before the arbitrator or the jury any loss or damage that has been sustained by reason of the breach of this covenant.

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Chitty L.J.

The covenant in my opinion is not gone; but the remedy by action has been taken away. On those short grounds I am of opinion that the appeal fails.

I have some difficulty in seeing that there can be any breach of a covenant for quiet enjoyment which would not be within the compensation clauses; but I leave that question open because there may be cases that have not occurred to me. I entirely accept what the Master of the Rolls has said with regard to a covenant of this kind. It would not be right, in my opinion, to extend it unreasonably so as to include as breaches such acts as are referred to in the evidence in this case. I mean the short and temporary interference for two or three days with the way the right over which was granted by the lease, and the acts complained of with reference to bringing carts for the removal of the earth that was taken out in constructing the tunnel, and other acts of a similar kind. But, accepting the wide interpretation of the covenant as laid down by Fry L.J. in *Sanderson* v. *Berwick-upon-Tweed Corporation* (1), it still appears to me that the defendant has not succeeded in establishing any breach which would not be the subject of compensation under the Railways and Lands Clauses Acts.

Therefore I agree that this appeal ought to be dismissed.

Collins L.J. I am of the same opinion.

Solicitors for Anderson: *Ford, Lloyd, Bartlett & Michelmore.*

Solicitors for company: *Cunliffes & Davenport, for R. Lingard-Monk, Manchester.*

(1) 13 Q. B. D. 547, 551.

H. C. J.
W. W. K.

WHITELEY EXERCISER, LIMITED *v.* GAMAGE.

NORTH J.
1898
July 15.

[1897 W. 1906.]

Company—Voluntary Winding-up—Dissolution—Jurisdiction—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 142, 143—*Costs—Taxation—Costs unnecessarily incurred—Plaintiff ordered to give Security for Costs—Stay of Proceedings—Affidavits filed by Defendant during Stay.*

Notwithstanding the dissolution of a company by reason of the expiration of three months from the registration of the return made by voluntary liquidators to the Registrar of Joint Stock Companies under s. 143 of the Companies Act, 1862, the Court has jurisdiction against the company in a proceeding commenced after the date of the registration, but before the end of the three months, even though the hearing does not take place till after the end of the three months.

In re Crookhaven Mining Co., (1866) L. R. 3 Eq. 69, followed.

The authority of that case has not been impeached by *In re Pinto Silver Mining Co.*, (1878) 8 Ch. D. 273; *In re London and Caledonian Marine Insurance Co.*, (1879) 11 Ch. D. 140; or *Coxon* v. *Gorst*, [1891] 2 Ch. 73.

An order was made dismissing an action with costs, because the plaintiffs had failed to comply with a previous order that they should give security for the costs of the action. That order contained the usual stay of proceedings by the plaintiffs until the security should be given. Immediately before the order for security was made, the plaintiffs' motion for an injunction had been ordered to stand over for a fortnight, the defendant undertaking to deliver to the plaintiffs copies of his affidavits within ten days. In pursuance of this undertaking the defendant prepared his affidavits during the stay of proceedings by the plaintiffs. On the taxation of costs under the order dismissing the action, the taxing master held that the defendant ought not to be allowed the costs of his affidavits, on the ground that they ought not to have been prepared during the stay of proceedings:

Held, that the taxing master had acted on a wrong principle, and that the costs of the affidavits ought not to have been disallowed upon that ground.

SUMMONS by the defendant asking that his objections, dated December 29, 1897, to the taxation of costs in this action, under an order dated August 5, 1897, might be allowed, and that it might be referred back to the taxing master to vary his certificate accordingly.

The action was brought to restrain the defendant from infringing a patent belonging to the plaintiffs. Notice of motion for an injunction was by leave of the Court served with the writ. The motion came on for hearing on June 18, 1897, and was then ordered to stand over for a fortnight, on the undertaking of the defendant to keep an account in the meantime, and to deliver to the plaintiffs copies of his affidavits by June 28, if possible.

On the same day (June 18), but at a later hour, an order was made by the master in chambers, upon a summons taken out by the defendant on June 17, that the plaintiffs should give security to the amount of 100*l.* for the costs of the action, and that until the security was given the plaintiffs were not to take any further proceedings in the action against the defendant.

The defendant proceeded in pursuance of his undertaking to prepare his affidavits.

On June 19, 1897, the plaintiffs' solicitor wrote to the defendant's solicitors, "If you will complete your order as soon as possible I will pay the money into court, which I have all ready in my hands for that purpose." Some delay took place; and ultimately on July 12 the plaintiffs' solicitor wrote to the defendant's solicitors: "I have my clients' instructions not to pay the money into court at present."

On July 29 the defendant took out a summons asking that the action might be dismissed with costs, the plaintiff company not having complied with the order of June 18. On August 5, 1897, an order was made by North J. that the action should stand dismissed with costs, including therein the costs of the plaintiffs' motion for an injunction, the costs to be taxed.

The defendant's solicitors carried in their bill of costs for taxation. The taxing master intimated that he should disallow the whole of the costs incurred in respect of the defendant's evidence in opposition to the motion for an injunction, and the costs of brief to counsel to oppose that motion, including the fees to counsel and to expert witnesses, on the ground that after the order of June 18, staying further proceedings on the part of the plaintiffs pending security, the defendant was not entitled to take any further steps until that order had been complied with.

The defendant on December 29 carried in objections to the disallowance, on the grounds (inter alia) that, having regard to the undertaking given by the defendant before the order (for security) was made, the defendant was bound to prepare for the hearing of the motion, and to furnish the plaintiffs with copies of his evidence by the agreed date; and did so prepare in the bonâ fide belief that the motion would be brought on and disposed of on July 2, 1897, to which date it stood over by consent: and that after the order was made the plaintiffs' solicitor repeatedly stated his readiness to comply with the order for security for costs immediately it was drawn up: and it was not until after the affidavits, the cost of which is disallowed, had been delivered to the plaintiffs that they decided not to go on with the action.

The taxing master in his answer to the objections dated January 28, 1898, said: "This is a taxation of costs between party and party, and I can only allow such costs as were strictly necessary. I cannot allow costs incurred through overcaution, and certainly not through mistake. The defendant obtained an order against the plaintiffs for security for costs, and for a stay of proceedings until it had been given, and I am of opinion that after that order it was not necessary to incur further costs until the order had been complied with. . . . The order never was complied with. The defendant's solicitors, however, proceeded with their preparations to meet the plaintiffs' case on its merits. In this, I think, they committed an error in judgment, which I cannot visit upon the plaintiffs in the shape of costs. . . . The order prevented the plaintiffs from proceeding with the action, and that was quite sufficient."

On February 4, 1898, the defendant took out the summons to vary the taxing master's certificate, but, owing to the state of business, it did not come on for hearing until this day, July 15, 1898.

The plaintiff company had resolved upon a voluntary winding-up, and on January 8, 1898, a general meeting of the company was held, which had been called by the liquidators, under s. 142 of the Companies Act, 1862, for the purpose of laying before the meeting an account shewing the manner in which the winding-up had been conducted. The liquidators, under s. 143 of the Act, made a return to the Registrar of Joint Stock Companies of the meeting having been held, and the return was registered on January 14, 1898. Thereupon, by virtue of s. 143, "on the expiration of three months from the registration of such return the company shall be deemed to be dissolved." The company was accordingly dissolved on April 14, before the summons to vary could be heard.

H. Terrell, Q.C., and *E. Clayton*, for the defendant. It will probably be objected by the plaintiffs that the Court has no jurisdiction by reason of the dissolution of the company. But *In re Crookhaven Mining Co.* (1) shews that, notwithstanding the expiration of the three months from the registration of the liquidators' return under s. 143, the Court has jurisdiction in a proceeding commenced before the expiration of the three months. The authority of that case has not been shaken by *In re Pinto Silver Mining Co.* (2), or *In re London and Caledonian Marine Insurance Co.* (3) In neither of those cases had proceedings been commenced before the dissolution of the company; and the point decided was that, after the dissolution of a company under s. 143, the Court had no jurisdiction to make an order to wind it up, unless the dissolution could be impeached on the ground of fraud.

The taxing master was wrong in disallowing the defendant's objections. The defendant had no reason to suppose that the plaintiffs would not give the security for costs; in fact, he was informed that they would. If he had not prepared his affidavits (as he had undertaken to do) he would have been without evidence to meet the plaintiffs' motion when it came on, as he had every reason to suppose it would do, on the day to which the hearing was adjourned. The costs were not unnecessarily incurred.

Swinfen Eady, Q.C., and *Kenyon Parker*, for the plaintiffs. The ratio decidendi of *In re Pinto Silver Mining Co.* (2) and *In re London and Caledonian Marine Insurance Co.* (3) is

(1) L. R. 3 Eq. 69.
(2) 8 Ch. D. 273.
(3) 11 Ch. D. 140.

inconsistent with *In re Crookhaven Mining Co.* (1) And in *Coxon* v. *Gorst* (2) Chitty J. said (3) that the dictum of Lord Romilly M.R. in *In re Crookhaven Mining Co.* (4), that the dissolution of a company does not deprive the Court of its jurisdiction over the company, "is contrary to the later decisions." The company is dissolved for all purposes, and proceedings cannot be continued against a company which has ceased to exist. It is like the death of an individual plaintiff, in which case no proceedings could be taken until the action had been revived. The defendant can only enforce any order which he obtains by means of an order to wind up the company, and the cases cited shew that he cannot obtain such an order.

The taxing master was right. The defendant ought not to have prepared his affidavits after the plaintiffs' proceedings were stayed. The plaintiffs had not undertaken to give the security.

NORTH J. I think this summons is well founded. First of all, as regards the question of jurisdiction, the general meeting of the company under s. 142 of the Companies Act, 1862, was held on January 8, 1898. At that time this action had been brought by the company against the defendant Gamage. Proceedings had been taken by the plaintiffs and had gone on for some time; but in July, 1897, they ceased to proceed further, and on August 5, 1897, an order was made dismissing the action with costs, the plaintiffs not having complied with an order that they should give security for costs. The defendant's bill of costs was prepared, sent in, and brought before the taxing master. He was attended by both parties, and, though he did not arrive at a final decision, he intimated the view which he was about to take; and on December 29 objections to the taxation were delivered by the defendant. Apparently he took some time to consider the objections and to prepare his certificate, and it was not until January 28 that he gave his reasons for not acceding to the objections, and certified the result of the taxation. The meeting of January 8 had been

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(1) L. R. 3 Eq. 69.

(2) [1891] 2 Ch. 73.

(3) [1891] 2 Ch. 75.

(4) L. R. 3 Eq. 72.

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held three weeks before this, and on January 14 the liquidators' return was made under s. 143. The defendant's summons to review the taxation was taken out on February 4. Unfortunately, the state of business has been such that I have not been able to dispose of that summons before to-day. If the summons could have been disposed of when it was ready for hearing it would have been dealt with before the company was dissolved under s. 143. But the hearing has been necessarily deferred, and the result is that the three months from January 14 had expired before the matter came before me. Is any right which the defendant would have had if the matter had come before me prior to April 14 to be lost, because it could not come before me in the ordinary course of business until after that date? In my opinion a suitor does not lose his rights for any such reason as that. As Lord Romilly M.R. said in *In re Crookhaven Mining Co.* (1): "At the time when this petition was presented, the Court unquestionably had jurisdiction, under the Companies Act, to order the call to be made, and I am of opinion that the delay in the hearing of the petition, caused by the intervention of the Long Vacation, cannot affect the rights of the petitioner, and that he is entitled to stand in the same position as if the petition had been heard before the expiration of three months from the 4th of June." It is said that that view has been impeached in some way by some subsequent cases which have been cited to me; but it does not seem to me that it is touched by either of the cases which were referred to. On the contrary, in one of those cases it is clearly recognised that there may be rights existing against the liquidator in respect of what he has done in the course of his employment in respect of which proceedings could not be taken against the company itself by reason of its having been dissolved. Whether there is anything of that sort in the present case I do not know, and I have not the means of dealing with it now. But I am quite satisfied that there is nothing in those cases to shew that the jurisdiction of the Court to make an order upon this summons is any less to-day than it was on February 4, when the summons was issued, which was long

(1) L. R. 3 Eq. 72.

before the expiration of three months from January 14. So much for the technical objection.

Now, as to the objection on the merits. On August 5, 1897, the Court ordered "that this action do stand dismissed out of Court with costs, including therein the costs of the plaintiffs' motion for an injunction," the costs to be taxed and paid by the plaintiffs. On June 18 the plaintiffs' motion for an injunction was proceeding when the defendant desired to file evidence in answer, and an arrangement was made as to the time within which that evidence should be filed. In the meantime the defendant applied for security for costs by the plaintiffs, and on the same day an order for security was made, which also directed that, until the security was given, all further proceedings by the plaintiffs should be stayed. The defendant proceeded to prepare affidavits in answer to the motion, that being the very purpose for which the motion had stood over; and on the day to which the motion stood adjourned, when the defendant had his affidavits ready to be used, the plaintiffs did not think fit to bring on the motion, and they never did so. The motion was never afterwards heard of, and no order has been made upon it. The plaintiffs' solicitor intimated to the defendant's solicitors that he was about at once to complete the security for costs; and I have no doubt that that representation was perfectly straightforward and honest; although, no doubt, a little while afterwards he received instructions from his clients that he was not to proceed any further with the matter, and then he communicated those instructions to the defendant's solicitors. But in the meantime the defendant had prepared his affidavits. In what position would he have been if he had not done so? If on July 2 security had been given, and the motion had been brought on again, he would have had over a fortnight for the preparing those affidavits for which the motion was adjourned. If he had said that he was prevented from preparing them by the order which stayed the plaintiffs' proceedings until security for costs had been given, he might have expected that the Court would laugh at him. For some reason, however, the taxing master did consider it a serious matter, and took the view that he could not allow the defendant the costs of those affidavits, because they were prepared during the time for which the plaintiffs' proceedings were stayed. In my opinion, that is an entire mistake of principle. The defendant was not bound, as the taxing master held, to stay his hand because there was a stay against the plaintiffs. I say nothing as to whether the costs of the affidavits should or should not be allowed on their merits; but I think the taxing master was entirely mistaken in principle; and on that ground I must refer the matter back to him. He has refused to allow the costs of these affidavits for the reason I have mentioned; independently of any question as to disallowing the whole or part of them on other grounds. I cannot deal with the costs on that footing: and the matter must go back to the taxing master that he may reconsider his certificate, the objections being allowed. The costs of the summons will be the defendant's costs in the taxation.

Solicitors: *Ward, Perks & McKay; Guilford E. Lewis.*

W. L. C.

ROMER J.

1898

June 24, 25.

In re MORRIS.

JAMES *v.* LONDON AND COUNTY BANKING COMPANY.

[1898 M. 1170.]

Bankruptcy—Bills of Exchange—Practice—Proof—Secured Creditor—Lumping Debts and Securities—Rights of Trustee—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *s.* 55.

Although in ordinary cases the practice of a proving creditor to lump together debts and securities is usual and proper, yet where the debts are distinct in substance, with different rights over as against third parties, or with different securities, it is the duty of the trustee in bankruptcy to insist that proofs shall not be made for a lump sum, and to require the proving creditor to distinguish and specify the particular debts and the value of the respective securities for the same.

Where a creditor held four separate bills of exchange, A, B, C, and D, which he had lumped together in one proof, and had received more than 20*s.* in the pound upon bills B and D, but less than the amount secured by bills A and C, so that he had not been thereby paid the total amount of his proof:—

Held, that he was not entitled to retain bills B and D and all moneys received thereon until the aggregate proof in respect of all four bills had been paid in full, but that the trustee in bankruptcy was entitled to have the surplus over 20*s.* in the pound in respect of each bill handed back to him.

Adjourned Summons.

The question raised by this application was whether a creditor, who held four separate bills of exchange, was entitled to lump them together and put in one proof for the aggregate amount of this debt, or whether he was bound to treat the bills as four distinct debts and to prove and receive dividends only for the amounts respectively secured by each bill. The facts were agreed, and were shortly as follows.

The plaintiff was the trustee of a creditors' deed entered into in April, 1895, by Morris, the debtor, who was the surviving partner of the firm of Prowse, Hall & Morris; the deed provided for the distribution of the assets of the firm as in bankruptcy among the assenting creditors, of whom the defendants were one, who would have been entitled to prove if the debtor had been adjudicated bankrupt.

At the date of this deed the defendants were the holders of four bills of exchange, hereinafter referred to as A, B, C, and D. A and B and C were for 2000*l.* each, and D for 1000*l.*

A and C were drawn by Job Brothers & Co. of St. John's, Newfoundland, upon Job Brothers of Liverpool, to the order of the Commercial Bank of Newfoundland, were accepted by Job Brothers, and were indorsed by the Commercial Bank of Newfoundland to Prowse, Hall & Morris, by them to W. H. Ridley & Co., and by them to the defendants.

B and D were drawn by Alan Goodridge & Sons of St. John's, Newfoundland, upon Charles T. Bennett of Bristol, to the order of the Commercial Bank of Newfoundland, were accepted by Charles T. Bennett, and were indorsed by the Commercial Bank of Newfoundland to Prowse, Hall & Morris, by them to W. H. Ridley & Co., and by them to the defendants.

All these indorsements were made at various dates, but each of them was made in the ordinary course of business and for value.

The Commercial Bank of Newfoundland, Job Brothers, C. T. Bennett, and Alan Goodridge & Sons all became bankrupt or entered into liquidation, and the defendants proved against their respective estates for the amounts due upon the bills to which they were respectively parties.

In September, 1896, W. H. Ridley & Co. paid to the defendants, in respect of the said four bills, 615*l.* 18*s.* 3*d.*, forming part of the estate of Prowse, Hall & Morris, which had come into the hands of W. H. Ridley & Co., and the propriety of this payment was not now disputed.

The defendants had also claimed under the creditors' deed against the estate of Prowse, Hall & Morris for the aggregate amount of the said four bills of exchange with noting expenses less the said sum of 615*l.* 18*s.* 3*d.*

It was admitted that upon their proofs against the various other parties to the said bills of exchange the defendants had received dividends in respect of bills B and D exceeding the amounts due on such bills with noting expenses and interest by

373*l.* 2*s.* 4*d.* and 192*l.* 19*s.* 6*d.* respectively, that they had not yet received payment in full for either of the two bills A and C, and that the whole amount so received by them was less than the aggregate amount due in respect of all four bills.

Under these circumstances the plaintiff claimed that the defendants were not entitled to any further dividends from the estate of Prowse, Hall & Morris in respect of bills B and D, and that the said sums of 373*l.* 2*s.* 4*d.* and 192*l.* 19*s.* 6*d.* ought to be repaid by the defendants to the plaintiff, and that they should be ordered to deliver up these bills to him. The plaintiff had paid the defendants a dividend from the estate of Prowse, Hall & Morris in respect of bills B and D, but did not know at the time of such payment how much had been received by them in respect of the said bills.

The defendants refused to make any repayment or to deliver up bills B and D, and contended that they were entitled to retain the said bills and all moneys received thereunder, and to receive further dividends thereon, until their aggregate claim in respect of all four bills with expenses and interest had been paid in full.

Levett, Q.C., and *F. Thompson*, for the plaintiff. In the present case the defendants are not entitled to lump these four debts together and prove for the aggregate amount of the bills; each bill must be treated as a separate debt, upon which not more than 20*s.* in the pound can be received. Upon bills B and D the defendants have already received more than 20*s.* in the pound: this excess must be refunded to the trustee and the bills delivered up to him. *In re Smith & Logan* (1) will be relied on by the defendants, but it is distinguishable from the present; that was a case of valuing securities. The debts here are distinct, with different rights as against third parties: *Paley* v. *Field.* (2)

Neville, Q.C., and *Muir Mackenzie*, for the defendants. The proof has been put in and allowed for the lump sum; it is therefore too late now to come forward and say that the debts and securities must be separately considered and valued: *In re*

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(1) (1895) 2 Manson, 70.

(2) (1806) 12 Ves. 435.

Smith & Logan. (1) The usual course now is to lump together the debts and securities. The total proof is what is looked at by the trustee, and at present we have not yet received 20*s.* in the pound on that: a creditor is always treated for voting purposes as a creditor for the whole amount of his proof; we are entitled to retain all we receive in respect of any of these bills until we are paid the aggregate debt, the amount of the proof. A secured creditor is not compellable to value separately the component parts of his general security: *In re Dubedat.* (2)

Romer J. I have no doubt that in an ordinary case in bankruptcy it would primâ facie be right, and the ordinary course to pursue, for a creditor, who has several debts due to him from a bankrupt, to prove for the lump sum without distinguishing the debts; in most cases that is all that is necessary. But it appears to me that if the debts are distinct in substance in this respect, that the trustee in bankruptcy may have different rights over with respect to some of these debts as against third parties, or if there are different securities given by the bankrupt for the different debts, it would not only be the right, but I should say it would be the duty, of the trustee in bankruptcy to require the person proving to specify the particular debts, and the value, if there were a security, of the security for each debt, unless, indeed, there was a right of consolidation.

That is what really was decided in the case of *In re Smith & Logan* (1), which has been cited before me. In that particular case it happened that the trustee having consented to the form of proof of different secured debts as a whole—the securities all being lumped and valued together as a whole—and having let the time pass by in which he could remedy that, in that state of circumstances it was held that he must be barred and that it was too late for him to come forward then and say that the debts ought to be separately considered and the separate securities separately valued. In my opinion the right of the trustee in bankruptcy to have debts separately valued where the debts may involve different rights over by the trustee or different rights of the trustee in respect of each debt is certainly not confined to a case where the debts are secured by securities of the bankrupt. Take this case—a case I put to counsel in the course of the argument. Suppose a creditor is a creditor on a bill of which the bankrupt is the last indorsee, and he is also a creditor on a common account for goods sold and delivered to the bankrupt, and he proves for the amount of the bill and for the amount of the ordinary debt. After proof, but before any payment of dividend by the bankrupt, the persons who are primarily liable on the bill before the bankrupt pay the bill in full, could the creditor in that case claim to keep on receiving dividends on that bill after it had once been paid him in full, as well as on the other debt, on the ground that he had proved for the whole? I think, certainly not. I think (unless, indeed, there had been any waiver of rights which I am not considering) that very case shews, to my mind, that in such a case with debts having separate rights attaching to them, separate liabilities and rights over against third parties, it is the duty of the trustee, as well as his right, to require that the proofs should not be lumped together, but that the items of the proof shall appear, though I quite agree that, so long as the same proof remains unpaid off as to any portion, he is for the purpose of the proof, and for the purpose of voting and so forth, regarded as a creditor for the total amount of his proof at the time when he comes in and proves.

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(1) 2 Manson, 70.

(2) (1892) 29 L. R. Ir. 324.

Now, to apply the principle of that case to the case before me. Here there were proofs in respect of four separate bills. In respect of those bills the trustee in bankruptcy had different rights. If the bills were paid in full by the bankrupt, the persons as against whom he would have a right over were different, so that he had different rights, and the trustee in bankruptcy had different rights, in respect of each of those bills. What happened? Two of those bills, B and D, are paid in full and overpaid, so that it appears that the creditor has been paid more than 20*s.* in the pound in respect of each of those two bills. Clearly he cannot claim, as against the persons who in the aggregate were liable on those two bills, to retain the surplus he has received, and attribute it to payment

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of the debts due on the other two bills. The persons who in the aggregate are liable on one of those bills, being different from the persons who in the aggregate are liable on other bills, have a right to complain if the holder of one bill claimed to set off the surplus he has received in respect of what was due on the other bills. They must as between themselves have a right to require between them payment of what the creditor had received over 20*s.* in the pound on the whole.

That being so, when I come to consider the bills before me, where the creditor proving has received more than 20*s.* in the pound: who, as between the persons in the aggregate liable on those bills, is entitled to receive the overplus? It turns out in this case it must be the trustee in bankruptcy, because all the other persons who were liable on the overpaid bills were primarily liable as against the trustee in bankruptcy. It appears to me, therefore, that the bankrupt's trustee was entitled in respect of the surplus received by each creditor in respect of each bill to have that surplus handed back to him, and I so decide.

Solicitors: *Simpson, Cullingford, Partington & Holland; Harries, Wilkinson & Raikes.*

W. C. D.

ROMER J.

1898

July 7, 8.

STRANGWAYES v. READ.

[1897 S. 2420.]

Lunacy—Maintenance—Common Order—Liability of Committee of Person to Account—Form of Inquiry.

The committee of the estate of a lunatic was authorized by an order of March, 1896, in the common form, to pay to the committee of the person 2500*l*. per annum for the lunatic's maintenance; the order also provided for the keeping up of a considerable establishment, and that the committee of the person should be at liberty to reside in the lunatic's own house and have the use of the horses, carriages, and other effects of the lunatic. As a matter of convenience to the committee of the person, the allowance was paid quarterly in advance. A quarterly payment of 625*l*. was made on October 29, 1896, and thirteen days afterwards the lunatic died. The executors of the lunatic claimed to be repaid the sum of 528*l*., being the proportionate part of the quarter's allowance for the period subsequent to the death of the lunatic; or, in the alternative, an inquiry what was properly payable for the maintenance of the lunatic during the thirteen days, and brought an action to enforce this claim:—

Held, that, as the lunatic had not been maintained for the whole year, the executors were entitled to receive from the committee of the person such portion of the yearly allowance as had not been properly expended for the purposes of the lunatic; and an inquiry was directed what sum ought to be allowed to the committee of the person during the time the lunatic was maintained, regard being had to the order of March, 1896, with liberty to apply in chambers for any balance that might be found due to the lunatic's estate, and as to costs.

Circumstances under which committees of the person may be called upon to account considered.

In re Ponsonby, (1842) 3 D. & War. 27, explained.

ACTION.

The question for decision on the trial of this action was, whether the committee of the person of a lunatic is liable, under the common order for maintenance, to account for, and, if necessary refund, the proportionate part of a yearly allowance, paid quarterly in advance, in the event of the death of the lunatic between two quarter-days.

The plaintiffs were the executors of the will of a widow lady, Mrs. A. M. L. Palmer, who subsequently to the date of her will became of unsound mind and incapable of managing her affairs.

By an order made in Lunacy on March 24, 1896, the custody of the lunatic's person was committed to her sister and niece, a Mrs. and Miss Read, jointly; the official solicitor was appointed committee of her estate; and 2500*l.* per annum was allowed, in the common form, for her maintenance, from January 29, 1896, according to the scheme therein mentioned, which provided for the payment of ground-rent, rates, and taxes, travelling and dress expenses, "board for nine months at 12*l.* per week," board wages for servants during the lunatic's absence in Glamorganshire, and generally for the support of an establishment of male and female servants, horses, and carriages suitable to the means and position of the lunatic. The order also provided that Miss Read should be at liberty to reside with the lunatic, and to retain for the use of the lunatic her leasehold residence No. 5, Whitehall Gardens, with the furniture and effects therein, and the leasehold stables then in her occupation, together with any horses, carriages, and other effects belonging to her then therein. The order also directed another allowance of 1000*l.* per annum to be paid to a nephew of the lunatic, one John Edwards Vaughan, towards keeping up the mansion-house and grounds known as Rheola, Glamorganshire (of which the lunatic was tenant for life and J. E. Vaughan tenant in fee), on the condition of Mrs. Palmer, the lunatic, with her accustomed staff of servants and horses, being allowed to reside there at the expense in all respects of the said J. E. Vaughan for a period not exceeding four months in every year.

After the date of this order the committee of the estate, in accordance with what he stated in evidence to be the usual practice in such cases, arranged to pay the 2500*l.* allowance quarterly in advance on account; the receipts were signed by both the committees of the person.

On October 29, 1896, the committee of the estate paid to the committees of the person the sum of 625*l.* in respect of the maintenance allowed for the quarter ending January 29, 1897; and on November 11, thirteen days after such payment, the lunatic died.

The plaintiffs claimed from the committees of the person the sum of 528*l.*, being the proportionate part, for the period subsequent to the death of the lunatic, of the quarter's allowance which had been paid in advance, or in the alternative an inquiry and account; this claim was resisted by the committees of the person. The matter then came before the Master in Lunacy, and he decided that the payment of the sum of 625*l.* as aforesaid was a proper payment, and that neither at law, nor in equity, nor in Lunacy were the plaintiffs entitled to receive any portion thereof. This decision of the master was subsequently discharged by the Lords Justices sitting in Lunacy. The plaintiffs then commenced this action against Miss Read and the legal personal representatives of Mrs. Read, the other committee of the person, who had died shortly after the lunatic, claiming the sum of 528*l.*, the proportionate part of the quarter's allowance paid in advance, or in the alternative an inquiry what sums were properly payable and paid for the maintenance of the lunatic between October 29, 1896, and her death.

It appeared that, owing to her state of health, the lunatic had been unable to leave London, and had not, as she was accustomed to do, spent any portion of the summer months at Rheola.

It was admitted that the lunatic had been properly maintained and cared for by the committees of the person from the date of the order of March, 1896.

After the death of the lunatic the plaintiffs, her executors, in in discharging her liabilities, made several payments in respect of rent, rates, gas, taxes, and current tradesmen's bills, a proportionate part of which, amounting to about 140*l.*, ought, in their opinion, to have been paid by the committees of the person out of the said allowance.

The action was tried with witnesses; the result of the evidence is referred to in the judgment.

Neville, Q.C., and *R. J. Parker*, for the plaintiffs. The committees of the person are bound to account for the unspent portion of this allowance. The plaintiffs have paid for rent, rates, and taxes, sums that ought to have been paid by the defendants. We do not say that a committee of the person is

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not entitled to derive some benefit from the allowance, but the plaintiffs are entitled to receive such portion of that allowance as cannot have been properly expended for the purposes of the lunatic. The contention of the defendants amounts to this—that if the whole of the year's allowance had been paid in advance, and the lunatic had died a week after, still they would be entitled to retain the whole amount without any account. Whatever the form of the order for maintenance, the Court has jurisdiction to order an account: *In re French.* (1) At any rate, we are entitled to an inquiry what sum ought to be allowed the defendants for maintenance, having regard to the terms of the order of March, 1896, and the period for which the lunatic was actually maintained.

Farwell, Q.C., and *Dickinson*, for the surviving committee of the person. There are two forms of order for maintenance: one in the common form, allowing so much money for maintenance simpliciter, under which the committee is not bound to account; and the other allowing the committee such a sum not exceeding a fixed amount, under which the committee is bound to account and prove how much he has expended. The order was taken in the common form because we did not wish to be obliged to account, and the master allowed us to take it in this form. Except in cases of gross mismanagement or misconduct, a committee with an order in the common form is never called upon for any account: *In re Ponsonby* (2); *Grosvenor* v. *Drax.* (3) In *In re French* (1) the order for account was refused. So long as the lunatic was properly maintained, and it is admitted here that she has been properly maintained, the committee is not liable to account for any surplus: *Jodrell* v. *Jodrell.* (4) In *Grosvenor* v. *Drax* (3) an account was refused, and it was held unanimously that the committee was entitled to retain the savings of the lunatic's maintenance. Commenting upon that decision, Sir E. Sugden in *In re Ponsonby* (5) says: "Since that case the point has never been raised, and the savings have always been considered as belonging to the person who had the care of the lunatic, and not to the lunatic's personal estate." It is intended by this form of order that the committee shall derive some benefit; all that is expected is that the lunatic be properly maintained: *In re Weld.* (1) As a fact, we have maintained this lady for ten months, though, according to the scheme, only nine months' board was provided for. The present application is contrary to the usual practice; the action cannot succeed if based on contract, and at law no portion of this allowance is recoverable.

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(1) (1868) L. R. 3 Ch. 317.

(2) 3 D. & War. 27.

(3) (1833) 2 Knapp, 82.

(4) (1851) 14 Beav. 397.

(5) 3 D. & War. 31.

E. F. Buckley, for the representatives of the deceased committee, adopted this argument, and submitted that the executors of the deceased committee were not necessary parties.

Romer J. This is a novel point, and one of considerable difficulty, but, after considering the matter, I have come to the conclusion that the plaintiffs are entitled to such relief as I will hereafter indicate.

I will first take the order of March 24, 1896, and see what it authorized. It authorized the committee of the estate to pay the committees of the person a sum of 2500*l*. per annum from January 29, 1896, for the maintenance of the lunatic; and if it is looked at, it will be clear that that sum was fixed with reference to a whole year's maintenance, and not for the maintenance for any portion of a year. For example, one of the items of the scheme under which the total of 2500*l*. per annum was arrived at was this: "Board for nine months at 12*l*. a week, 520*l*."; because it was contemplated, having regard to the other part of this order, that the lunatic would not, in fact, be maintained at the expense of the committees of the person for the full fifty-two weeks of the year. Clearly, therefore, the allowance of 2500*l*. was sanctioned only as the provision for the maintenance of the lunatic for a year taken as a whole, and was not an allowance, at the rate of 2500*l*. per annum, to be taken or treated as if it was accruing, or liable to be paid to the committees of the person de die in diem, nor was it an allowance fixed quarterly to be paid at the rate of 2500*l*. per annum. Still less was it an order which sanctioned any payment, so far as I can see, in advance—certainly not expressly; all that the order did was to justify the committee of the estate, if the lunatic was maintained for a year by the committees of the person, in paying over to the committees of the person the full yearly allowance of 2500*l*. Now, what happened upon that order? The committee of the estate met the representative of the committees of the person; the question how the payment should be made was discussed; and it was arranged, as a matter of convenience between the parties, that the committee of the estate should make payments in advance on account—for that is what the evidence really came to. Now, no doubt that arrangement was come to in the expectation and on the footing that the lunatic would be maintained for the year, and in the expectation that in that case the committees of the person would be entitled to retain the full 2500*l*. paid. Taken in the light of a mere payment on account in that way, and on that footing and understanding, that was a reasonable temporary arrangement to have been come to between the committee of the estate and the committees of the person; but if it was to be taken as an agreement by the committee of the estate with the committees of the person, that quarterly payments should be paid in advance to the committees of the person, on the footing that the committees of the person should be able to retain that quarterly payment whether the lunatic was maintained for the full quarter or for the year or not, then I am of opinion that was not justified by the order, and was an improper payment by the committee of the estate. I think it would be justified, when taken on the footing I have indicated, that it was only intended to be taken as a payment on account of the full yearly maintenance, regarding the maintenance to be made for the year as a whole, and subject, if the lunatic was not maintained for the whole year, to the lunatic's estate having such rights in that case as ought to have been provided for by express agreement between the parties.

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(1) (1882) 20 Ch. D. 451.

Now what happened was this. The lunatic was maintained for nine months and a few weeks, but the whole yearly payment has been made, although the lunatic was not maintained for a year; and it is clear from the evidence of one of the plaintiffs that, as a matter of fact, the committees of the person are claiming to retain the whole yearly allowance, though they did not maintain the lunatic for a year, and though in fact payments have had to be made by the executors of the lunatic, which ought to have been paid by the committees of the person, if the lunatic had lived during the year and had been maintained by them. I cannot see how, in this case, the committees of the person can claim to retain the whole of the 2500*l*. as against the executors of the lunatic. I am certain that the payments were never made by the committee of the estate on the footing that the committees of the person should in any event retain the whole. And if they had been, the payments would have been unauthorized on the part of the committee of the estate. And seeing that the committees of the person well knew under what order this money was paid, and that it was the lunatic's money, or a portion of the lunatic's money, they cannot now claim to retain it in full. That being so, it appears to me that in some shape or form the executors are entitled to recover from the committees of the person such portion of that yearly allowance as could not be said to have been properly expended by them for the purpose of the lunatic, having regard to the nature of the allowance, made as a yearly allowance by the order of March 24, 1896. Although in the form of the order which I propose to make I shall not say anything expressly about it, I think it right to say this. I quite agree, if the 2500*l*. having been paid, the lunatic had been maintained for the whole year, then the committees of the person could not have been obliged to account at all for any portion of that 2500*l*., unless a case had been made against them that they had not properly maintained the lunatic in accordance with the provisions of the order. But those conditions do not apply to the case before me. The cases which have decided that no account can be taken as against the committees of the person, who have received a yearly payment and duly maintained the lunatic, of what has been done by them with the yearly allowance do not apply to the case before me at all. The cases which shew that in ordinary circumstances committees of the person are not bound to account are liable to exceptions. For example, the committees of the person are liable to account even if they have maintained the lunatic for a year, if it be shewn against them that they had not properly maintained the lunatic.

Now, in estimating what sum ought so be allowed to the committees of the person for the time they have maintained this lunatic, certainly attention ought to be paid to the rate of allowance, and the scheme of allowance provided for by the order of March 24, 1896, and to the other provisions of that order. I think the inquiry I propose to direct should be proceeded with by paying attention to all the circumstances I have indicated, and probably also to the circumstances that, in a case of this kind, in making an allowance to the committees of the person, it is not intended, so long as the committees of the person discharge their duty, to make them account, or to prevent them from possibly receiving indirectly some benefit from the order. I say this so that when this inquiry is proceeded with the committee of the person shall receive no injury. I shall take care myself—the inquiry being proceeded with in my chambers—to see that every just allowance is made to the committees of the person; but I do not think, as they have not maintained this lunatic for the year, that they can properly claim the whole yearly allowance. So far as I can see, there is no authority which prevents my deciding in the way I am doing. The case of *Grosvenor* v. *Drax* (1) is dealt with by Lord Cairns in the case of *In re French* (2), and I need not again refer to it. But I desire to say, with regard to the case of *In re Ponsonby* (3), that I think the observations made by Sir Edward Sugden at p. 31 of the report in that case, where it is said of *Grosvenor* v. *Drax* (1) that the great lawyers in the Privy Council who decided that case decided that the committee was entitled to retain the savings of the lunatic's maintenance, must be considered with reference to the ordinary case that I have previously pointed out, namely, a case where the committee has duly maintained the lunatic for the full period for which the allowance was made, and where no case is made against the committee of not having properly applied the allowance in accordance with the provisions of the scheme under which the order for maintenance was made, or not having properly maintained the lunatic. I do not think Sir Edward Sugden could have intended to lay down the general proposition that when once the committee has received the lunatic's money he is under no circumstances bound to account for the money so received.

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(1) 2 Knapp, 82.

(2) L. R. 3 Ch. 317.

(3) 3 D. & War. 27.

Now, the inquiry I therefore propose to direct is to this effect: I direct an inquiry what sum should be allowed for the maintenance of the lunatic during the time she was maintained, regard being had to the order dated March 24, 1896, and what sums have been paid to the defendants by the committee of the estate on account of the yearly allowance provided by that order. Then there will be liberty to the plaintiffs to apply in chambers for the payment of any balance that may be found due to the lunatic's estate on taking those inquiries. I reserve the costs of the action until it is seen how the inquiries turn out; and there will be liberty to apply in chambers, and as to the costs, so that the matter can be decided speedily there. With regard to the minor point raised, that one of the committees of the person has died, it appears to me that the receipt by the two committees of the lunatic's money from the committee of the estate, was a receipt of moneys for which under the circumstances they were, both of them, bound to account in equity; and, inasmuch as both received it, the executors of the deceased committee are liable to account just as much as the surviving committee. I have assumed that the executors of the deceased committee admit assets. If that is not so, there must be liberty to apply.

Solicitors: *Longbourne, Stevens & Co.; Hickin, Smith & Capel-Cure.*

W. C. D.

WRIGHT J.

1898

June 9; July 20.

In re AURIFEROUS PROPERTIES, LIMITED (No. 2.)

[0027 of 1896.]

Company—Winding-up—Creditor-Contributory—Insolvent Company holding Shares—Set off of Debt against Calls—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 38—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 16, 38, 101—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.

The G. Company, Limited, held shares in the A. Company, Limited, and before either company went into liquidation calls were made on the shares, and the A. Company became indebted to the G. Company for money lent.

The A. Company having been ordered to be wound up by the Court and the G. Company, which was insolvent, having passed an extraordinary resolution for voluntary winding-up, Wright J. held that s. 10 of the Judicature Act, 1875, did not enable the liquidator of the G. Company to set off the debt against the calls: [1898] 1 Ch. 691:—

Held, subsequently, that, in the winding-up of the A. Company the G. Company could not take any dividend on the debt until it had paid up all calls in the winding-up of the A. Company.

In January, 1896, the Auriferous Properties Limited (below called the Auriferous Company) became indebted to the African Gold Properties, Limited (below called the Gold Company) in the sum of 2775*l.*, for cash paid on account and at the request of the former, against which certain securities were handed over.

The Gold Company was a shareholder in the Auriferous Company, and was indebted to it in respect of two calls of 5*s.* per share, made in January and June, 1896, upon the 2500 shares in the Auriferous Company.

On December, 19, 1896, an order was made for the winding-up of the Auriferous Company by the Court. On January 20, 1898, the Gold Company passed an extraordinary resolution for voluntary winding-up, and on January 26, 1898, an order was made continuing the voluntary winding-up under the supervision of the Court. The Gold Company was insolvent.

The Gold Company proved its claim for debt in the winding-up of the Auriferous Company.

The Gold Company by its liquidator raised, by summons taken out in the winding-up of the Auriferous Company, the question whether the debt owing to it by the Auriferous Company could be set off against the calls due by it to the Auriferous Company.

This summons was afterwards amended by being further intituled in the winding-up of the Gold Company. Wright J., on May 4, 1898, held that s. 10 of the Judicature Act, 1875, did not enable the liquidator of the Gold Company to set off the debt against the calls. (1) Before the order embodying this decision was drawn up the liquidator of the Auriferous Company sought to have inserted in the order a declaration that in the winding-up of that company the Gold Company could not take any dividend upon its debt owing from the Auriferous Company until the Gold Company had paid up all calls in the winding-up of the Auriferous Company on the shares in it held by the Gold Company.

The application was heard by Wright J. on June 9, 1898.

Howard Wright, for the liquidator of the Auriferous Company. At the former hearing it was conceded that the Gold Company had a right to prove for the debt in the winding-up of the Auriferous Company. That company is now about to declare a dividend in favour of its creditors, and the liquidator of the Gold Company says that his company is entitled to receive the dividend, and that the Auriferous Company must prove for the calls in the winding-up of the Gold Company. But no partner, as a shareholder is in effect, can take a dividend until he has paid up all calls on his shares.

[WRIGHT J. The liquidator of the Gold Company will say, I suppose, that it is sufficient if he pays all that that is payable in respect of calls—namely, his dividend on them.]

The Auriferous liquidator is entitled to set off the calls against the dividends. The case is within the principles laid down by Lord Chelmsford L.C. in *Grissell's Case* (2), and the Gold liquidator cannot have any dividend until he has paid up all calls.

George R. Northcote, for the liquidator of the Gold Company.

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(1) [1898] 1 Ch. 691.

(2) (1866) L. R. 1 Ch. 528.

There is no right of set-off, but there are mutual rights of proof and set-off of dividends. The Auriferous Company is only a creditor of the Gold Company, and must take dividends pari passu with the other creditors—otherwise the effect would be that this particular creditor of the Gold Company would be paid in full. *Grissell's Case* (1) does not apply where the creditor-contributory is an insolvent company in liquidation.

Howard Wright, in reply. As long as the case is confined to the winding-up of the Auriferous Company there is nothing to displace the ordinary rule that the contributory must pay up all calls before he can compete with other creditors. [He also referred to *Black & Co.'s Case.* (2)]

Cur. adv. vult.

July 20. WRIGHT J. I have already considered this case in one of its aspects, with the result that, in my judgment, the liquidator of the Gold Company could not set off, against calls made by the liquidator of the Auriferous Company, the debt owed by the latter to the former company. A further question was not discussed on the first argument, and remains to be considered. The liquidator of the Auriferous Company is paying a dividend to its creditors, and he asks for a declaration to the effect that he is entitled to hold the dividend due to the Gold Company against the liability of the latter company for calls in arrear on its shares in the Auriferous Company. Primâ facie the Gold Company is entitled to take its dividend. Its claim as a creditor has been duly ascertained in the appropriate proceeding, and it is primâ facie immaterial that the creditor happens to be also a debtor to the Auriferous Company. There is no contract for a set-off, nor do the articles of association of either company appear to contain any provision for it, nor do the general statutes of set-off apply. Nor, as it seems, is the doctrine of set-off in bankruptcy, which under s. 10 of the Judicature Act, 1875, is extended to the liquidation of companies—*Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (3) —applicable to this case. That doctrine has been held to

(1) L. R. 1 Ch. 528.
(2) (1872) L. R. 8 Ch. 254.
(3) (1884) 9 App. Cas. 434.

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apply only to cross rights existing at the commencement of the winding-up: *Ex parte Theys* (1); but here the call has been made in the liquidation, and until it was made there was only a contingent liability which might never become enforceable and could not be set off, unless, perhaps, after some process of valuation. But in my opinion this case is governed by the principle established in *Grissell's Case* (2), and is within the express terms of the Lord Chancellor's judgment in that case. If the creditor-contributory were allowed to take the dividend without paying the call, he would be receiving payment of a part of the debt which the company owes to him without making his contribution to the fund out of which that debt, with the other debts of the company, was to be paid. "If," Lord Chelmsford says (3), "the amount of an unpaid call cannot be satisfied by a set-off of an equivalent portion of a debt due to the member of a company upon whom it is made, it necessarily follows in the last place, that the amount of such call must be paid before there can be any right to receive a dividend with the other creditors. The amount of the call being paid, the member of the company stands exactly on the footing of the other creditors with respect to a dividend upon the debt due to him from the company. The dividend will be of course upon the whole debt, and the member of the company will from time to time, when dividends are declared, receive them in like manner when either no call has been made, or, having been made, when he has paid the amount of it." This passage is cited as authoritative by Fry J. in *In re West of England Bank.* (4) There must be an order as asked by the liquidator.

Solicitors for applicant: *Freshfields & Williams.*

Solicitor for liquidator of the Gold Company: *W. H. Hudson.*

(1) (1884) 25 Ch. D. 587.

(2) L. R. 1 Ch. 528.

(3) L. R. 1 Ch. 536–7.

(4) (1879) 12 Ch. D. 823.

F. E.

C. A.
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ROMER J.
April 19, 20, 21.
C. A.
July 13, 22.

In re THE REGISTERED TRADE-MARKS OF JOHN BATT & CO.

AND

In re CARTER'S APPLICATION FOR A TRADE-MARK.

Trade-mark—Application for Registration—Resemblance to Registered Marks —"Entry made without sufficient cause"—Motion to Expunge such Marks —Bonâ fide Intention to Use—Non-user—Rectification of Register— Patents, Designs, and Trade Marks Acts; Act of 1883 (46 *&* 47 *Vict. c.* 57), *ss.* 65, 72, 75, 76, 90; *Act of* 1888 (51 *&* 52 *Vict. c.* 50), s. 17—*Practice—Appeal—Oral Evidence below—Judges' Notes.*

A trader cannot properly register a trade-mark for goods in which he does not deal, or in which he has not, at the time of registration, some definite and present intention to deal.

The enactment in s. 75 of the Act of 1883, that "registration of a trade-mark shall be equivalent to public use of the trade-mark," as altered by s. 17 of the Act of 1888, substitutes registration for previous user and reputation gained thereby, but does not mean that continued registration is equivalent to continued user. The "public use" referred to in these sections is not use since registration, but use and reputation at the time of application.

Where there had been no real user of a trade-mark before or since its registration, and it had been registered in a particular class, without any bonâ fide intention to use it in that class, the Court, on an application made under s. 90 of the Act of 1883 by another trader to register a nearly identical mark in respect of that particular class, rectified the register by expunging the existing mark as an entry made without sufficient cause; and directed the comptroller to proceed with the registration of the applicant's mark.

The decision of Romer J. affirmed.

THIS was an appeal by G. A. Kottgen, trading as John Batt & Co., from an order of Romer J. removing two trade-marks from the register.

One of these trade-marks, No. 27,850, was registered in July, 1882, in the name of John Batt & Co., for several classes of goods; and class 42, which comprises "substances used as food, or as ingredients in food," and includes cereals, was one of them.

The other trade-mark, No. 72,790, was registered in August, 1888, in the same name, for class 42 only.

Both trade-marks consisted of a device representing a butterfly with open wings.

In 1897 James Carter & Co., who carry on business as seed merchants, applied to register as a trade-mark in class 42, for oats, a device representing a butterfly having closed wings attached in an upright position to a body shaped like the sheath of an oat. This application was No. 207,397.

The comptroller refused to register this device as a trade-mark upon the ground that it was identical with the butterfly marks registered by John Batt & Co. for class 42; and James Carter & Co. applied by way of motion that the register of trade-marks might be rectified by removing therefrom the two trade-marks of Messrs. Batt & Co., Nos. 27,850 and 72,790, and that the comptroller might be directed to proceed with Messrs. Carter & Co.'s application, notwithstanding the registration of Messrs. John Batt & Co.'s two above-mentioned marks.

The main ground of Messrs. Carter's application was that John Batt & Co. never dealt in goods in class 42, and were not justified in registering any trade-mark for goods in that class. In support of their motion to expunge, the applicants produced evidence to shew that Messrs. John Batt & Co., who described themselves as general merchants, were, in fact, shippers or exporters to East India, China, and Japan, whose business was mainly, if not entirely, confined to shipping hardware and machinery goods; that they had occasionally shipped woollen and similar goods, and also candles and matches, and had applied thereto these butterfly marks, which had been registered in a great number of classes; but that they had never used the butterfly marks in connection with any goods in class 42.

In opposition to the application, Mr. Kottgen deposed that his firm were exporters of and dealers in every kind of goods, including articles of food; that in 1882 they decided to register all the trade-marks used in their business in all the classes in which they had used or intended to use such marks; that they had registered the marks in question in several classes of goods including class 42, and intended to use and had in fact used the butterfly mark on many varieties of goods, including several kinds of foodstuffs, such as biscuits, confectionery, rice, starch,

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peppermint, oil, and condensed milk, such as were commonly sold in grocers' shops, and that they intended to use the butterfly mark on several other articles of food for which his firm expected orders. On cross-examination he refused to give any information as to the kind of goods in class 42 which he exported or dealt in; but on re-examination he said that he had exported or dealt in confectionery, biscuits, and butter. And according to the view which the Court took of the evidence, it came out clearly that he had never exported or dealt in oats, but that he intended to export or deal in anything he could. It also appeared from the evidence that John Batt & Co. had a large number of trade-marks; that the register contains no less than 169 entries in their name; that Stevens, a member of the firm, had offered all these except fourteen for sale, and that these fourteen did not include any registered mark applicable to class 42.

The application came on for hearing before Romer J. on April 19, 1898.

Neville, Q.C., and *Austen-Cartmell*, for the applicants, Messrs. James Carter & Co. The respondents' mark must be limited to those articles in class 42 in connection with which the trade-mark is actually used; registration cannot be claimed for all the articles specified in a class when the business carried on comprises only a specific portion of the articles named in the class: *Edwards* v. *Dennis*. (1) There is no evidence here of user by the respondents of this mark on oats or seeds or anything of that nature. A trader has no right to register broadcast, as it were, on the chance of his eventually dealing in all or some of the goods in the numerous classes in which he has registered. The mark must be registered for the particular trade carried on. Registration is for the protection of trade, not for obstruction. Registration for an entire class followed by user on one description of goods only will not give an exclusive right to a trade-mark for all descriptions of goods in that class: *Hargreave* v. *Freeman*. (2) User is essential; the doubt on this point expressed in the judgments in *Edwards* v.

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(1) (1885) 30 Ch. D. 454.

(2) [1891] 3 Ch. 39.

Dennis (1) was set at rest by *In re Hudson's Trade-marks.* (2) Though s. 75 of Patents, Designs, and Trade Marks Act, 1883, makes registration equivalent to user, still it is only primâ facie evidence of title, and we are not precluded from shewing that there has been no user: *Pinto* v. *Badman* (3); *Apollinaris Co.* v. *Snook.* (4) The respondents' contention is opposed to the remarks in *In re Apollinaris Co.'s Trade-marks.* (5) The respondents' mark ought therefore to be entirely expunged, or limited to the class of goods in which they deal.

Levett, Q.C., and *Sebastian*, for the respondents. We admit that this mark has not been used for oats or the class of goods sold by the applicants; but the respondents are general merchants, and if they received an order for oats or seeds would at once want to use this mark. Cognate substances are fairly covered by the class in which the mark is registered, and a rival trader has no right to say, "The mark is not used for the whole class; therefore I will use it for such goods as you do not sell."

The Court has no jurisdiction to remove a mark that has been rightly entered in the first instance; it is the right of every trader who sells goods in a particular class to register a mark for the whole class, and keep it there; and he may register in any number of classes in which he has a bonâ fide intention to deal. Registration is now equivalent to user, and user of the whole class. This application is made under s. 90 of the Act of 1883 on the ground that this "entry" has been made "without sufficient cause." This has not been made out; the old rule 34 as to non-user is no longer in force, therefore non-user is no longer a ground for varying the entry. The cases cited by the applicants do not vary the Act of 1883. In *Edwards* v. *Dennis* (1) the question for decision was whether Edwards, as proprietor by assignment, was entitled to be on the register. In *In re Apollinaris Co.'s Trade-marks* (5) one of the marks sought to be registered was not the company's mark, but that of the owners of the spring; that is not like

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(1) 30 Ch. D. 454.

(2) (1886) 32 Ch. D. 311.

(3) (1891) 8 Rep. Pat. Cas. 181.

(4) (1890) 7 Rep. Pat. Cas. 474.

(5) [1891] 2 Ch. 186, 234.

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this case. In 1882, when our mark was registered, no one else had any wish or intention of using the "Butterfly" for any of the goods in class 42. The Court must regard the state of things existing when the mark was registered, now many years ago. In 1882 there was an intention to trade in all goods in class 42; this intention has only been partially carried out; that is all that can be alleged against us. This is quite a novel experiment; the application ought to be refused.

Ingle Joyce, for the comptroller.

Neville, Q.C., in reply, was stopped.

Romer J. I take it to be clear that if persons register new trade-marks, which they say they intend to use, they must, at the date of registration, have a bonâ fide intention of using those trade-marks in respect of the goods for which they register them. Cotton L.J. pointed that out very early in the case of *Edwards* v. *Dennis* (1), when he said (2): "Even if a trade-mark can be registered which is not in actual use" (and, I may add, which has since been used) "it ought to be restricted to those goods in connection with which it is going to be used"; and, indeed, one cannot help seeing the evils that may result from allowing trade-marks to be registered broadcast, if I may use the expression, there being no real intention of using them, or only an intention possibly of using them in respect of a few articles. The inconvenience it occasions, the cost it occasions, is very large, and beyond that I cannot help seeing that it would lead in some cases to absolute oppression, and to persons using the position they have obtained as registered owners of trade-marks (which are not really bonâ fide trade-marks) for the purpose of trafficking in them and using them as a weapon to obtain money from subsequent persons who may want to use bonâ fide trade-marks in respect of some classes in respect of which they find those bogus trade-marks registered. Indeed, it appears from the evidence of several experts that a system of trafficking in trade-marks appears to be carried on at the present day. I am not saying, and do not say in this case there is evidence on which I can

(1) 30 Ch. D. 454.

(2) 30 Ch. D. 474.

act, that Messrs. Batt & Co. have in fact trafficked in the sense in which I am using that expression; but with regard to the registration by Messrs. Batt & Co. of their trade-marks, I find that in the year 1882 they registered over forty trade-marks, and most of them in several different classes. When I look at the variety of those trade-marks, and the variety of goods for which they were registered, it is difficult to suppose that there could have been a bonâ fide intention on the part of that firm to use all these trade-marks in respect of all the classes in which they were registered. I do not go beyond that, nor do I intend to speculate and try to ascertain for what purpose that registration was made.

Coming now to the particular trade-mark in question, the "Butterfly," and the class in which it was registered (though it was registered in other classes also), namely, class 42, I have tried to ascertain from the evidence why that was registered. Now Mr. Kottgen has ventured to say that he has in fact used the "Butterfly" mark for some articles which he described as confectionery, butter, biscuits, and, I think, starch, and I gather from what he now says in the box that he intends it to be understood that there was some user even before registration. The firm have been challenged as strongly as they could be challenged to prove any user of that trade-mark for any of the goods in class 42, and to shew anything which would justify them in contending before me that when they registered there was a bonâ fide intention to use the trade-mark "Butterfly" on any of those goods in class 42. Mr. Kottgen, who is the only witness called in this case on behalf of Messrs. Batt & Co., notwithstanding the challenge, on cross-examination could not give a single instance where the trade-mark of the "Butterfly" had been used on any of the articles in class 42, or to say when, where, or how it was used, and, further, he declined to answer any question on cross-examination which was directed to ascertain if there had been a user or a bonâ fide intention to use it. I have seen that witness in the box; I have had the advantage of hearing him and seeing his demeanour. I would only say that he was a very unsatisfactory witness, and I feel I cannot rely upon vague statements made by him as to user, or as to his memory as to user when uncorroborated, and there is not a tittle of corroboration of his vague general statement that there has ever been any user or any bonâ fide intention to use that "Butterfly" trade-mark in respect of any of the goods in class 42. Looking at the evidence as a whole, which I do not intend to refer to in detail in this judgment, I come to the following conclusions of fact on the evidence before me: that there was no real user of this trade-mark of a "Butterfly" at any time before registration; that there has been no real user of the "Butterfly" trade-mark since registration in respect of any of the articles in class 42; and I further come to the conclusion that at the date of this registration there was no bonâ fide intention on the part of this firm to use that trade-mark for any of the goods in that class.

The result is that, in my opinion, that registration was wrong, and ought to be expunged off the whole class, and I order that it be expunged accordingly.

Seeing that the whole trouble and the necessity for this application has arisen and been caused by the wrongful original registration by the respondents' firm, and their refusal to consent in any way to amend the position and to assist the applicants in their application, I order the respondents to pay the costs of the motion to rectify.

With regard to the other motion of the applicants, all I need order is that the registrar do proceed with the application, but as to that motion I make no order as to costs.

[Counsel for the comptroller asked for payment by the applicants of the comptroller's costs on the second motion. He did not ask for costs on the first motion. His Lordship made an order as asked.]

W. C. D.

C. A. Messrs. John Batt & Co. appealed, and the appeal came on for hearing on July 13.

Levett, Q.C., and *Sebastian*, for the appellants.

Neville, Q.C., and *Austen-Cartmell*, for the applicants, Messrs. Carter & Co.

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Ingle Joyce, for the comptroller.

Levett, Q.C., in reply.

The arguments were similar to those already reported, and the following additional authorities were referred to: *In re Ralph's Trade-mark* (1); *In re Leonard and Ellis' Trade-mark* (2); *In re Australian Wine Importers, Limited* (3); Sebastian on Trade Marks, 1st ed. 233.

Cur. adv. vult.

July 22. The judgment of the Court (Lindley M.R., and Chitty and Collins L.JJ.) was now delivered by

LINDLEY M.R. This appeal is based upon the grounds, first, that the evidence did not warrant the conclusion of fact arrived at by the learned judge, and, secondly, that even if the fact was as he stated it, such fact is not sufficient to entitle the Court to remove the marks from the registry.

As regards the fact of user, everything depends upon the evidence of Mr. Kottgen. [His Lordship then stated shortly the effect of this evidence, remarking that Romer J. considered the evidence of Mr. Kottgen not to be relied on as to the user of his trade-marks in connection with any goods comprised in class 42, and continued:—] Under these circumstances we are unable to come to the conclusion that the learned judge was wrong in his view of the facts.

This brings us to the question of law. We will assume that Mr. Kottgen, when he obtained registration of his marks, was a general exporter and dealer, exporting and dealing in goods of various descriptions, but not, in fact, exporting or dealing in goods in class 42, although ready to do so if opportunity offered. We will assume, further, that he has always been and is still ready to do so, but that he has not even yet exported or dealt in any goods in that class except confectionery, biscuits, and butter, which exception we will assume in his favour.

A question of law then arises which may be stated shortly as follows: Can a man properly register a trade-mark for goods in which he does not deal or intend to deal?—meaning by

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(1) (1883) 25 Ch. D. 194.

(2) (1884) 26 Ch. D. 288.

(3) (1889) 41 Ch. D. 278.

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intending to deal having at the time of registration some definite and present intention to deal in certain goods or descriptions of goods, and not a mere general intention of extending his business at some future time to anything which he may think desirable. This question we answer in the negative. To answer it otherwise would be unduly to strain the language of the Acts relating to trade-marks, and to render those Acts extremely mischievous instead of beneficial to trade and commerce.

The Trade Mark Registration Acts presuppose some business or trade in some kind of goods made, sold, or otherwise dealt with in the way of business. Although s. 75 of the Act of 1883 said that "registration of a trade-mark shall be equivalent to public use of the trade-mark," this language, even when in force, did not and could not mean that continued registration was equivalent to continued user. So to construe the language would lead to the irrational conclusion that a man might properly register a trade-mark for any goods he chose, although he carried on no trade or business in them at all. Such a person if properly on the registry might then object to anybody else registering that mark (see s. 72) without buying him off. Sect. 75 was addressed to the time of registration; it substituted registration for previous user and reputation gained by it. The corresponding section of the prior Act of 1875 (namely, s. 2) was discussed in *Edwards* v. *Dennis* (1), and the contention that the language of that section meant more than we have stated was emphatically repudiated by the Court of Appeal, although it had found favour in the Court below. That decision fairly looked at really governs this case in principle.

It is true that in *Edwards* v. *Dennis* (1) the Court had to deal with the assignee of a trade-mark; but the rights acquired by his assignor on registration were very carefully examined, and Bacon V.-C. (2), and also Cotton L.J. (3), and another Lord Justice (4), all expressed clear opinions that the assignor had no right to register his trade-mark for goods with which

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(1) 30 Ch. D. 454. (2) 30 Ch. D. 465. (3) 30 Ch. D. 474.

(4) Lindley M.R., then Lindley L.J., 30 Ch. D. 476, 477.

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he had no concern. Fry L.J. went less fully into this question, but it is plain that his view was the same. (1)

The Act of 1883 must of course be looked at to see whether its language has rendered it necessary to come to a different conclusion on this point, and we have looked at it carefully, but we cannot find that it has. Sect. 75 of the Act of 1883, on which Mr. Levett based his argument, was repealed by s. 17 of the Act of 1888, and that section, which is retrospective, makes "application for registration" instead of "registration" equivalent to public use. This alteration makes it still plainer than before that the public use referred to is not use since registration, but use and reputation at the time of application. Sect. 65 of the Act of 1883 says that "a trade-mark must be registered for particular goods or classes of goods." This leaves open the question what goods or classes of goods are referred to. Does the section refer to goods or classes of goods which the applicant for a registered mark makes or deals in or intends to make or deal in in the sense above explained, or does it refer to goods or classes of goods which he does not make or deal in and which he has no definite intention of making or dealing in? Common sense and *Edwards* v. *Dennis* (2) concur in confining the goods or classes of goods to those which a man makes or deals in or intends to make or deal in when he applies for registration.

It remains only to consider whether s. 90 of the Act of 1883 (the rectification section) is applicable to this case. We are of opinion that it is. The applicants are parties aggrieved; for the trade-mark they desire to have registered is kept off the register by reason of the presence on it of the marks of J. Batt & Co. The entry of these marks is "an entry made without sufficient cause in the register." We are not disposed to put a narrow construction on this expression, nor to read it as if the word "made" were the all-important word, and as if the words "made without sufficient cause" were "made without sufficient cause at the time of registration," so as to be confined to that precise time. If any entry is at any time on the register without sufficient cause, however it got there, it ought in our opinion to be treated as covered by the words of

(1) 30 Ch. D. 479.

(2) 30 Ch. D. 454.

the section. The continuance there can answer no legitimate purpose; its existence is purely baneful to trade, and in our opinion in the case supposed the Court has power to expunge or vary it.

But, however this section is construed, the present case falls well within it. It may be said that this decision may impose undue restrictions on the acquisition of trade-marks by general dealers in goods of many sorts. We do not, however, believe it will fetter legitimate trade. A man can always apply to register a mark or marks as he really wants them. But if a man procures a mark to be registered for goods in which he does not deal, either when he applies for registration or within a reasonable time afterwards, he does so at his peril (to use Fry L.J.'s expression) and he exposes himself to the risk of having his mark expunged or varied, and of having the monopoly conferred by registration restricted to his legitimate requirements. The trade-mark 72,790 is confined to goods in class 42, and the learned judge was right in expunging that entry. The trade-mark 27,850 ought to be expunged as to goods in class 42; but on the evidence before us there is no reason for expunging it from the register as regards other goods. The order ought to be cancelled in this respect. But this variation, which rectifies what is probably a slip made in drawing up the order, will not affect the appeal, which must be dismissed with costs.

[During the argument of the foregoing case LINDLEY M.R. made the following remarks: "It is desirable that solicitors should know that on appeals in cases where evidence has been taken orally in the Court below, it is their duty to apply in good time for the judge's notes of evidence. If they do so, they will generally be supplied by the judge's clerk with copies of those notes; whereas if they apply, as is frequently done, just before the appeal is heard, there is no time to furnish these copies. The notes themselves are sometimes difficult to read."]

Solicitors: *Shepheards; Mann & Taylor; The Solicitor to the Board of Trade.*

W. W. K.

In re DIXON.
TOUSEY *v.* SHEFFIELD.

[1898 D. 2424.]

C. A.
1898
BYRNE J.
June 20
July 1.
C. A.
July 20.

Costs—Taxation—District Registries—Liverpool District Registry—Affidavit—Evidence—Charges and Expenses of Liverpool Solicitors' Attendances in London—Rules of the Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-r.* 43.

The taxation of party and party costs in the Liverpool and Manchester District Registries proceeds on the same principles as obtain in the London Taxing Masters' Offices, where the costs in other district registries are taxed.

There is no hard and fast rule that in no case, where proceedings have been initiated in a district registry and are heard in London on affidavit evidence only, will the costs of the country solicitors' attendance at the hearing in London be allowed.

Such costs may be allowed in very exceptional cases, where no London agent has been employed, e.g., where charges of fraud or personal misconduct have been made and have failed.

Decision of Byrne J. affirmed.

This was an originating summons issued in the Liverpool District Registry, asking for the appointment of a judicial trustee and the removal, on the ground of misconduct, of the defendants, who were the present trustees of the will of the above-named Dixon.

The plaintiffs were beneficially entitled to one-fourth of the trust estate. The parties beneficially entitled to the remaining three-fourths objected to the application.

The defendant Sheffield severed from his co-defendants, and appeared by Messrs. Norris & Sons, solicitors at Liverpool; and the other defendants appeared by Messrs. Tyrer, Kenion & Co., solicitors at Liverpool.

The whole of the evidence on both sides was taken by affidavit, and no notice to cross-examine was given.

The summons was heard by Byrne J., the judge to whom the business of the Liverpool and Manchester District Registries is assigned, and was dismissed with costs to be paid by the plaintiffs.

On Messrs. Norris & Sons carrying in their bill of costs for

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taxation by the Liverpool District Registrar, the following items were objected to by the plaintiffs:—

	£	*s.*	*d.*
"Feb. 18, 19. Journey from Carlisle to London and back, and attending hearing of case in court, when same adjourned. Engaged two days	6	6	0
Paid railway fare and expenses . .	6	6	0
"Feb. 25, 26. Journey from Carlisle to London and back, and attending adjourned hearing, when arguments concluded but judgment reserved. Engaged two days	6	6	0
Paid railway fare and expenses . .	6	6	0"

The district registrar allowed these items, stating, in his answer to the objections, as follows:—

"I have carefully considered the objections of the plaintiffs to the charge for journeys to London to attend the two hearings in this matter, and the affidavits which have been filed. I am of opinion that this is a case in which these items should be allowed, having regard to the importance of the case as affecting the defendant Sheffield. Although the evidence was contained in affidavits, the action was a serious one for him, and it was important in his interests that the case should be brought before the Court with a full knowledge of all the facts so far as he was concerned, to ensure which it was necessary that the country solicitor who had acted for him throughout the matter should be present, especially as no London agents were employed. In the exercise of my discretion I am of opinion that this is a proper case in which to allow these journeys on a party and party taxation."

Similar items in Messrs. Tyrer, Kenion & Co.'s bill of costs were objected to, but were allowed on similar grounds.

The plaintiffs then took out a summons to review the taxation, which came on for hearing before Byrne J. on June 20, 1898.

A. àB. Terrell, for the plaintiffs. The Liverpool and Manchester District Registries, and all other district registries, are part of the High Court, and the taxation of cases commenced in them and heard in London ought to proceed on the same principles as any ordinary case in London. The allowance for the attendance of a country solicitor at the hearing in London is within the discretion of the taxing officer, and as a general rule no allowance will be made for such attendances except in very exceptional cases: *Bell* v. *Aitkin.* (1) The mere fact that the case is complicated, or that the country solicitor is better acquainted with the subject-matter than the London agent, is no ground for allowing such attendance: *Ex parte Snow* (2); *In re Storer.* (3) The personal attendance of the country solicitor must be really necessary for the proper conduct of the case; for instance, where the evidence is to be given orally, and the country solicitor has himself seen and taken the depositions of the witnesses: *The Soto.* (4) But here the whole of the evidence was either documentary or by affidavit, and no notice to cross-examine was given. It cannot be said, therefore, that the attendance of the Liverpool solicitors was really necessary to assist the counsel engaged in the case. If a London agent had been employed, the allowance for his attendance would have been three guineas. As it is, the items allowed for expenses and attendances of the Liverpool solicitors amount to nearly 50*l.* The taxing officer has proceeded on a wrong principle, and the items ought to be disallowed: Rules of the Supreme Court, 1883, Order LXV., r. 27, sub-r. 43.

Preston, for the defendant Sheffield. The defendants were charged with misconduct and breaches of trust, which charges totally failed. The taxing officer has found special circumstances, and in the exercise of his discretion has allowed the items objected to, as no London agent was employed, and the Court will not interfere with his discretion.

Rotch, for the other defendants, adopted the same line of argument, and also referred to items 173 and 174 in Appendix N to the Rules of the Supreme Court, 1883. (5)

A. àB. Terrell, in reply.

Cur. adv. vult.

(1) (1868) L. R. 3 C. P. 320.

(2) W. N. (1879) 22.

(3) (1884) 26 Ch. D. 189.

(4) [1893] P. 73.

(5) Annual Practice, vol. ii. p. 202.

July 1. BYRNE J. This is a summons to review taxation as between party and party, in respect of allowances by the district registrar for the attendance of Liverpool solicitors in London on the hearing of an originating summons, all the evidence having been by affidavit.

The case was a peculiar one. Although initiated by summons under the Judicial Trustees Act, 1896, it was equivalent to a most hostile action to remove trustees on the ground of misconduct. Unjustifiable charges (including charges of gross personal misconduct, unsupported by evidence) were made, and I dismissed the application with costs. On taxation the district registrar has allowed for the attendance in London of Liverpool solicitors at the hearing upon two occasions, namely, when the case was part heard and on the adjourned hearing. In my opinion, so far as the Chancery Division is concerned, the rules and practice in respect of the taxation of party and party costs are the same in the London Taxing Masters' Offices and in the offices of the district registrars of Liverpool and Manchester; and I consider that such rules and practice apply in respect of cases heard in London exactly as if proceedings had been initiated in any other district registry than those of Liverpool and Manchester and had been taxed in London. In other words, the district registrars in Liverpool and Manchester ought to act upon the same principles as the London taxing masters act in taxing costs where the proceedings have been commenced in district registries in other parts of the country. I have given the matter careful consideration, and have made inquiry of two of the London taxing masters. In the result I am satisfied that there is no such hard and fast rule as that suggested by the applicants' counsel—namely, that in no case where all the evidence is taken by affidavit ought the costs of the attendance of the country solicitor to be allowed. On the contrary, I believe it to be in accordance with the existing practice to allow such costs, in certain rare and exceptional cases, in the exercise of the discretion of the taxing officer. This discretion ought to be, and is, exercised with the utmost care and caution. One of the London taxing masters informs me that he does not think he has allowed such costs on a party and party taxation in more than about half-a-dozen instances. I can well understand that cases do occur, where personal fraud or misconduct has been charged and has failed, where all the preliminary proceedings have been taken in the district registry, and where all the facts are known in the offices of the country solicitor, that the taxing officer may fairly consider the presence in London of the country solicitor to be reasonably necessary for the conduct of the defendant's case. At the same time, it affords no reason at all for exercising the discretion that no London agent has been employed. If the charges for attendance of the country solicitor are allowed in the rare and exceptional cases referred to, it is not in accordance with the practice, as I understand it, to allow charges also for the attendance of the London solicitor. I have confined my remarks to cases arising in the Chancery Division, and I do not consider that I am departing from the general rule laid down in the case of *The Soto.* (1) My view is that upon a party and party taxation the costs of an unsuccessful litigant are not to be increased simply by reason of the opponent client, or his local solicitor in Liverpool or Manchester, electing that such solicitor should attend in London instead of employing a London agent; that no different rule or practice ought to prevail upon taxation before a Liverpool or Manchester district registrar than that prevailing upon taxation in London of the costs arising in any other of the numerous district registries throughout the country; and that the discretion of the taxing officer ought always to be exercised in such a matter (as I have no reason to doubt it is) with very great care and only in exceptional cases. The present case was a very exceptional one, and the discretion of the taxing officer having been exercised with care, and after consultation with a most experienced London taxing master, I am not prepared to interfere with his discretion or to go into the question of the amount of the allowances complained of. I may add that the items 173 and 174 in Appendix N to the Rules of the Supreme Court, 1883 (Annual Practice, vol. ii. p. 202), cited by the respondents' counsel, have no bearing upon the present case, inasmuch as

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(1) [1893] P. 73.

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they do not apply to cases heard in London or Middlesex. The summons must be dismissed, with costs.

A. àB. Terrell asked for leave to appeal.

Byrne J. Yes. It is a case of great general importance.

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The plaintiffs appealed. The appeal was heard on July 20, 1898.

A. àB. Terrell, for the appeal. The proceedings in this case were carried on in the district registry according to General Orders, Order v., r. 1. The principles of taxation are the same as in proceedings in the High Court: Order LXV., r. 27, sub-r. 43. I contend, first, that it does not matter in the taxation of costs how far the solicitor has to go to attend the sittings of the Court. A solicitor practising in a particular court is supposed to be there, and cannot charge for coming a great distance to attend. There is a solicitor on the record, and how can he claim more than the regulation fee for attending the Court? But apart from this, and treating the matter as within the discretion of the registrar, the attendance of the country solicitors in court cannot be allowed in such a case as this. Where the evidence is oral and the country solicitor's personal knowledge is wanted as to what the witnesses can say, his attendance may be allowed; but that cannot apply here, where the evidence was wholly by affidavit, and no notice to cross-examine was given. In *Bell* v. *Aitkin* (1) it was held that the taxing master had a discretion, but that it could only be exercised in very special cases; and so in *Potter* v. *Rankin.* (2) In *In re Foster* (3) the attendance of the country solicitor was allowed on the ground that he knew more about the matter than the London agent; but this was disapproved of by Pearson J.: *In re Storer* (4); and *Ex parte Snow* (5) supports Pearson J.'s

(1) L. R. 3 C. P. 320.
(2) (1868) L. R. 4 C. P. 76.
(3) (1878) 8 Ch. D. 598.
(4) 26 Ch. D. 189.
(5) W. N. (1879) 22.

view. In *The Soto* (1) Barnes J. reviewed the cases, and the result was that the attendance of the country solicitor was to be allowed only where he had got up the evidence and the witnesses were to be examined orally. I say, then, that the question really does not arise, for the solicitor is only a solicitor attending court in the ordinary course, and that if he is to be treated as having employed a London agent, the case is not one in which his personal attendance in London ought to be allowed.

Preston (*Eve, Q.C.*, with him), for Sheffield. The summons was of the most hostile character, alleging that Sheffield had been a trustee of another estate in respect of which proceedings had been taken against him in the Palatine Court; that these proceedings had been compromised on the terms of his retiring, and that immediately afterwards he got himself appointed a trustee of this will. The negotiations as to the former proceedings took place through Sheffield's Liverpool solicitors. The summons also alleged immorality against Dixon and fraud against Lightfoot. The registrar allowed the attendances on the ground that this was a special case; and Byrne J. took the same view, and thought it one where the attendance of the country solicitors might prove necessary for the purposes of justice. In cases from Manchester and Liverpool a larger discretion ought to be allowed than in other cases.

[He was then stopped by the Court.]

Rotch, for the other trustees.

LINDLEY M.R. I am not disposed to criticise the judgment of Byrne J. on points not judicially before us. I think that he arrived at the right conclusion. Having regard to the attack made on the character of the trustees, although the case was heard only on affidavit evidence, I think it not unreasonable that the Liverpool solicitors, who knew not only all that was in the affidavits but much that was not in them, should be personally present, that they might, if necessary, give such explanations as they only could give. The appeal must be dismissed.

(1) [1893] P. 73.

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CHITTY L.J. It appears from *Bell* v. *Aitkin* (1) that there is no inflexible rule that the country solicitors' costs of attending at the hearing in London should not be allowed. It is more difficult to make out that their attendance is necessary where the evidence is taken only by affidavit and there is no cross-examination, but there is no inflexible rule to the contrary. In the present case, having regard to the attacks made on the trustees, I think that the attendance of the country solicitors was desirable, and that the costs of them ought to be allowed. The registrar considered the objections, and stated his opinion that the case was a special one, and that these costs ought to be allowed. We give no opinion on the general question suggested as to Liverpool and Manchester cases.

COLLINS L.J. I am of the same opinion.

Solicitors for applicants: *J. F. Harrison & Burton, Liverpool.*

Solicitors for respondents: *Norris & Sons, Liverpool; Tyrer, Kenion & Co., Liverpool.*

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(1) L. R. 3 C. P. 320.

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WILLIAM ROBINSON & CO., LIMITED *v.* HEUER.

[1898 W. 1950.]

Restraint of Trade—Severable Covenant—Contract of Hiring and Service—Injunction.

By an agreement in writing H. agreed to serve the William Robinson Company as confidential clerk for five years from January 1, 1895, the company having the option to renew the engagement for five years more. The company could dismiss H. at any time by three months' notice. H. agreed that during the term he would devote his whole time and attention to the business of the company, and that he would not during the engagement, without the consent of the company, engage as principal or servant in any business relating to goods of any description made or sold by the company, or in any other business whatever, upon pain of instant dismissal. H. covenanted that if he should be so dismissed he would not at any time within three years from his dismissal be engaged directly or indirectly as principal, agent, or servant in the business of dealer in wares of the description made by the company, within 150 miles of W. In 1898 H. left the service of the company without leave and became traveller to another firm carrying on the same business. The company applied for an injunction to restrain H. during the term of service from carrying on as principal, agent, servant, or otherwise, any business relating to goods of the description made by the company, and from soliciting orders for other firms.

North J. refused an injunction on the authority of *Ehrman* v. *Bartholomew*, [1898] 1 Ch. 671:—

Held, on appeal, that, during the continuance of the engagement, the agreement made by H. with the company that he would not engage in any business relating to goods sold by the company, was valid though not restricted in point of space, and that it was severable from the agreement not to engage in any other business, and ought to be enforced by injunction. An injunction was therefore granted as asked, but limited to the first term of five years, the company waiving their option to retain H. in their service for another five years, and the Court doubting whether the agreement ought to be enforced for that further term.

THIS was an appeal by the plaintiffs from a decision of North J. refusing an injunction.

By an agreement, dated February 8, 1895, William Robinson & Co., Limited, of Wolverhampton, manufacturers of and dealers in enamelled hollow-ware, &c., agreed to engage Heuer, and Heuer agreed to serve them, as confidential clerk from January 1, 1895, for the term of five years, with the option on the part of the company of renewing the engagement for the further term of five years. The salary was to be 200*l.* a year, to be raised from time to time at the discretion of the directors. The company were to have power to determine the engagement on any of the annual quarter-days by giving Heuer three months' notice. By clause 5 Heuer agreed during the term to devote the whole of his time, care, and attention to the business of the company, and to obey their orders.

Clause 6: "The said H. W. Heuer shall not during this engagement, without the previous consent in writing of the said W. Robinson & Co., Limited, their successors and assigns carry on or be engaged either directly or indirectly, as principal, agent, servant, or otherwise, in any trade, business, or calling, either relating to goods of any description sold or manufactured by the said W. Robinson & Co., Limited, their successors and assigns, or in any other business whatsoever, upon pain of instant dismissal and forfeiture of salary previously earned and unpaid: and for the consideration aforesaid the said H. W. Heuer hereby covenants and agrees with the said W. Robinson & Co., Limited, their successors and assigns, that if during the period of five years, or such extended period of five years, at the option of the said W. Robinson & Co., Limited, their successors and assigns, as aforesaid, he shall be dismissed from their employment, he shall not at any time within three years from the time of such dismissal either directly or indirectly engage or be engaged either as principal, agent, servant, or otherwise, in carrying on the business of an enamelled hollow-ware dealer at any place within 150 miles of Wolverhampton."

The remainder of the clause provided for a restraint on Heuer's trading if he left the company's service at the end of the five years, or the further term of five years, as the case might be.

In 1898 the defendant, without leave, left the company's service and engaged himself to other manufacturers in the same line of business as the plaintiffs, and solicited orders from the plaintiffs' customers. The plaintiffs thereupon commenced this action, claiming (1.) an injunction to restrain the defendant from "carrying on as principal, agent, servant, or otherwise, any trade, business, or calling relating to enamelled hollow-ware goods, or other goods of any description sold or manufactured by the plaintiffs, or from travelling for or soliciting orders for any persons other than the plaintiffs, in breach of an agreement dated the 8th of February, 1895, and made between the plaintiff company of the one part and the defendant of the other part"; (2.) damages for breach of the agreement; (3.) costs.

The plaintiff company moved before North J. for an injunction. The defendant raised a defence that a new agreement had been substituted for that of February 8, 1895. North J. decided this point against him, but considered that the present case was governed by *Ehrman* v. *Bartholomew* (1), and refused the injunction.

The plaintiffs appealed.

Swinfen Eady, Q.C., and *Micklem*, for the appeal. There is here no termination of the agreement of service. The defendant during the period agreed upon had no power to determine the contract. The employers had such a power, but they have not exercised it; the defendant, therefore, is still in their service —he cannot get rid of the agreement by absenting himself. In *Rogers* v. *Maddocks* (2) a restrictive covenant against dealing in malt liquors and aërated waters, which might be too wide, as the plaintiffs did not deal in aërated waters and therefore did not need so wide a protection as the covenant purported to give, was held severable, and an injunction was granted confined to malt liquors. So, here, the injunction asked does not go so far as the covenant, which we say is severable in the same way. We are willing to dismiss the defendant now, and take an injunction in the milder form applicable to that case.

[*Everitt, Q.C.*, for the defendant. That is not the case made by the pleadings. The plaintiffs say they have not dismissed the defendant, and there is no evidence that when dismissed he will do anything in breach of the covenant applicable to that case, nor can it be presumed that he will.]

We are willing to waive the option of continuing the defendant's employment for the second term of five years.

(1) [1898] 1 Ch. 671.

(2) [1892] 3 Ch. 346.

[They were then stopped by the Court.]

Everitt, Q.C., and *Clare*, for the defendant. The plaintiffs might have dismissed the defendant, and obtained a reasonable injunction with a limit as to time and space. As it is, they are endeavouring to starve out the defendant by keeping him in their employment and obtaining a wider injunction. Suppose the clause is severable, as the plaintiffs contend, it is still void as being larger than was required for the plaintiffs' protection.

[The Court suggested an injunction on the footing of the defendant having been dismissed. The defendant did not assent.]

The case of *Ehrman* v. *Bartholomew* (1) governs the present. There, as here, the defendant resigned, and the plaintiff would not accept his resignation; so the rights had to be determined under a covenant applicable to the period of employment. A restrictive covenant like the present is void—at least, so far that the Court will not grant an injunction for breach of it: *Ward* v. *Byrne* (2); *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (3)

[Chitty L.J. referred to *Lumley* v. *Wagner*. (4)]

That was a covenant only as to a particular employment. It is shewn by *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (3) that there must be a limit of space as well as of time.

[Lindley M.R. Is there any authority that in a covenant limited to the time of employment there must be a limitation as to space?

Swinfen Eady, Q.C. There is authority the other way.]

Swinfen Eady, Q.C., in reply. The defendant insists that he has been dismissed; so he may be treated on that footing.

[Chitty L.J. But you have throughout insisted that he has not been dismissed.]

Lindley M.R. In this case we have been very much embarrassed by the peculiar form of the agreement and by the course taken by both sides; but the result at which I have arrived is that justice requires that some injunction should be granted. This defendant is avowedly breaking his agreement, and the question is whether he should be at liberty to do so.

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(1) [1898] 1 Ch. 671.

(2) (1839) 5 M. & W. 548.

(3) [1894] A. C. 535, 568.

(4) (1852) 1 D. M. & G. 604.

The agreement is a very peculiar one. The plaintiffs are a company who carry on business in enamelled hollow-ware—articles of iron and tin enamelled inside—and they took into their employ the defendant as their confidential clerk. That opens to him all the secrets of their trade. The service was to commence from January 1, 1895, and last for a term of five years from the above date, "except as hereinafter mentioned," which refers to powers of dismissal afterwards given to the plaintiffs, and to the option on the part of the plaintiffs of renewing the engagement for the further term of five years; so that they can at their option convert this period of service into a period of ten years. I pass over the rest of the agreement till we come to the 6th clause, which is composed of three parts, the first two of which are material. The first is that the defendant shall not during this engagement, without the previous consent of the plaintiffs, "carry on or be engaged either directly or indirectly as principal, agent, servant, or otherwise, in any trade, business, or calling, either relating to goods of any description sold or manufactured by the said William Robinson & Co., Limited, their successors and assigns, or in any other business whatever, upon pain of instant dismissal and forfeiture of salary previously earned and unpaid."

The first question is whether that clause, limited as it is by the words "during this engagement," is invalid in point of law or not.

There is no authority whatever to shew that that is an illegal agreement—that is to say, that it is unreasonable, and goes further than is reasonably necessary for the protection of the plaintiffs. It is confined to the period of the engagement, and means simply this—"So long as you are in our employ you shall not work for anybody else or engage in any other business." There is nothing unreasonable in that at all. When, however, you come to talk about an injunction to enforce it, there is great difficulty. The real difficulty which has always to be borne in mind when you talk about specific performance of or injunctions to enforce agreements involving personal service is this—that this Court never will enforce an agreement by which one person undertakes to be the servant of another; and if this agreement were enforced in its terms, it would compel this gentleman personally to serve the plaintiffs for the period of ten years. That the Court never does. Therefore an injunction in these terms cannot be granted, although the agreement to serve the plaintiffs and give his whole care, time, and attention to their business, and not to engage in any other business during his engagement, is valid in point of law. But the plaintiffs do not ask for an injunction in the terms of that agreement. They say, "We do not want you to compel the defendant to serve us; all we want you to do is to hold him to so much of his bargain as relates to his competing with us"; and the plaintiffs ask for an injunction to restrain him from engaging directly or indirectly in any trade, business, or calling relating to goods of the description sold or manufactured by the plaintiffs. That is a totally different thing, and does not sin against the principle to which I have alluded. Even that might be a little hard if it were for ten years under the peculiar circumstances with which we have to deal; but Mr. Swinfen Eady has undertaken not to exercise the option of prolonging the first period of five years, and that gets rid of all hardship.

The next branch of the clause is important. This, be it observed, gives the plaintiffs liberty to dismiss the defendant if he commits any breach of this agreement. It goes on to say (I am only stating the substance) that if, during the period of five years or the extended period at the option of the plaintiffs, the defendant shall be dismissed, he shall not at any time within three years from the time of such dismissal directly or indirectly engage or be engaged either as principal, agent, or otherwise in carrying on the business of an enamelled hollow-ware dealer at any place within 150 miles of Wolverhampton. That is a distinct agreement. There is nothing there about any other trade or business, and if the plaintiffs had taken the course of dismissing the defendant and the defendant had done what he has done, an injunction in the terms of the second branch would be almost a matter of course. But the plaintiffs for reasons of their own decline to dismiss the defendant. They can dismiss him if they like, and it has been weighing on my mind whether we ought not to say, "You have got your remedy in your own hands; if you choose to dismiss him you will get an injunction." Mr. Everitt says they will not get it, for that there is no evidence before the Court that the defendant threatens and intends to do what he should not. That is a good technical answer for the moment, but as a business answer, I do not see that there is anything in it. The short effect of the case is this. Here is a gentleman who is in a position to do the most grievous injury to the plaintiffs in direct violation of his bargain, which is good in point of law, and which is enforceable within limits; and in my opinion he ought to be restrained by an order in this form: The plaintiffs by their counsel undertaking not to exercise the option conferred upon them by clause 2, grant an injunction to restrain the defendant during his engagement from carrying on or being engaged in, &c., any trade, business, or calling relating to goods of any description sold or manufactured by the plaintiffs, leaving out the words "or any other business." The costs both here and below ought to be the costs of the plaintiffs in any event.

CHITTY L.J. The relation of the plaintiffs to the defendant at the present time is that of master and clerk or servant. The defendant is the confidential clerk of the plaintiffs, and by the agreement he has bound himself to serve for a period of five years with the option on the part of the plaintiffs (with no correlative option on his part) to continue the engagement if they think fit for a further period of five years. Mr. Swinfen Eady has given up that second period of five years as part of the terms on which the Court grants the injunction. Under the 5th clause the defendant agrees during the term to devote the whole of his time, care, and attention to the business of the plaintiffs, and to obey their orders, and then to supplement that and to support it by a definite negative agreement, we have the 6th clause. The 6th clause is divided into three parts. We are concerned with the first two. The first is that, during the engagement, he will not without the consent of the plaintiffs be directly or indirectly engaged in this particular business, or in any other business.

Now it appears to me on the authorities that during his engagement that is a valid contract in point of law. It is not necessary to speak about the term "or any other business." As at present advised, I see no objection to it, and the case seems to me to fall within the authority of *Pilkington* v. *Scott* (1) and *Hartley* v. *Cummings*. (2) The agreement then is during the engagement, as was that in *Lumley* v. *Wagner*. (3) A strange contest was carried on between the parties before the motion was made by the plaintiffs before North J. The defendant said that he had dismissed himself with the assent of the plaintiffs, or had been dismissed. The plaintiffs said, "No, you have not; and, what is more, we will not dismiss you"; and so the matter comes on before the Court of Appeal, the defendant contending that the engagement is determined, the plaintiffs that it is still on foot. I think that the engagement is still a continuing engagement, and that the plaintiffs, therefore, are right. The point in the case which appeared to me to be most in the defendant's favour is this. There are at the end of the negative clause during the continuance of the engagement the words which have been read—"upon pain of instant dismissal and forfeiture of salary." I quite agree that, notwithstanding penalties being affixed to a contract, the Court can grant an injunction, and that those words are not sufficient as a general rule to prevent the Court doing so. The materiality of them in the present case is this—that the plaintiffs had it in their hands to dismiss the defendant at once, and thereupon the defendant would have become subject to the less onerous covenant which appears in the second part of clause 6. Mr. Swinfen Eady proposed that he should give an undertaking to dismiss at once, and take the injunction in the more limited form. Mr. Everitt stood upon his right, and said, "There is no evidence that my client threatens or intends to break the

(1) (1846) 15 M. & W. 657.
(2) (1847) 5 C. B. 247.
(3) 1 D. M. & G. 604.

covenant"; and technically he is right, because he has not at the present moment been dismissed, and that covenant only comes into operation upon dismissal. It might perhaps have been wise for the defendant to have accepted the olive-branch that was offered by Mr. Swinfen Eady.

But now, coming back to the case upon the first part of the clause, here is a plain, deliberate breach of the agreement by the confidential clerk of the plaintiffs, who is now directly engaged in their particular business for other persons who are their rivals in trade, and in fact we have the case of a confidential clerk acting in deliberate violation, not only of his agreement, but of his general relation of confidence towards his employers. That is a very strong case. Mr. Swinfen Eady did not ask for an injunction exactly in the terms of the covenant in the first part of the 6th clause: he was willing to give up "or in any other business"; therefore we need not consider that part of the case beyond saying this, that in my opinion it is clearly severable.

Now, we are not upon the question of whether this covenant is good or bad in law, but whether in this case the Court ought to grant an injunction; and the difficulty that for a long time pressed on my mind was whether we should not by means of the injunction be compelling the defendant in substance to serve the plaintiffs. The great objection has been removed by Mr. Swinfen Eady's undertaking not to exercise the option of renewing the engagement for the further term of five years, thus reducing the term of the engagement to a period of somewhat more than two years from the present time. I think that an injunction for that time is reasonable, and I think justice requires that this confidential clerk should not go about, in violation of his agreement, betraying his masters.

Collins L.J. My view has been so exactly stated in the judgments that have been delivered, that I should be afraid of detracting from what has been already said by making any observations of my own.

Solicitors: *Sharpe, Parker, Pritchards & Barham, for Hunt & Skidmore, Wolverhampton; Rowcliffes, Rawle & Co.*

H. C. J.

C. A.
1898
July 11.

In re CALCOTT AND ELVIN'S CONTRACT.

[1890 C. 4225.]

Bankruptcy—Registration in Middlesex—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *ss.* 20, 54, 121 (1)—*Middlesex Registry Act*, 1708 (7 *Anne*, c. 20), s. 1.

An order of adjudication in bankruptcy is not a "conveyance" within the meaning of the Middlesex Registry Act (7 Anne, c. 20), s. 1.

A debtor entitled to land in Middlesex was adjudged bankrupt, and an order was made under s. 121 of the Bankruptcy Act, 1883, that his estate should be administered in a summary way, so that no appointment of a trustee was made. He never disclosed to the official receiver the fact of his having the land, and he subsequently mortgaged it to a mortgagee who forthwith registered his mortgage:—

Held (reversing the decision of Kekewich J.), that the title of the official receiver was not postponed to that of the mortgagee by reason of the order of adjudication not having been registered.

On January 26, 1887, Michael Death presented a petition for adjudication in bankruptcy against himself, and on the same day a receiving order was made. On January 28, 1887, he was

(1) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52):—

"20 (1.) Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the Court may allow, the Court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee."

Sub-s. 2 provides for the order of adjudication being gazetted and advertised.

Sect 21 provides for the appointment of a trustee by the creditors, for his giving security to the satisfaction of the Board of Trade, and for the Board giving a certificate that he has been duly appointed, and for his appointment taking effect from the date of such certificate.

"54 (1.) Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee.

"(2.) On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed.

"(3.) The property of the bankrupt shall pass from trustee to trustee, including under that term the official receiver when he fills the office of trustee, and shall vest in the trustee adjudged bankrupt, the order being simply, "It is ordered that the said Michael Death be and the said debtor is hereby adjudged bankrupt." On January 29 an order was made under the Bankruptcy Act, 1883, s. 121, that the estate of the debtor should be administered in a summary manner.

The bankrupt did not disclose in his statement of affairs that he was entitled to three leasehold houses in Middlesex, and he remained in possession of them.

On September 4th, 1894, the bankrupt mortgaged these houses by demise to Calcott to secure 825*l.*; and on December 25, 1894, made a second mortgage of the property to him to secure a further advance of 350*l.* These mortgages were duly registered in the Middlesex Registry.

The mortgagee in 1897 contracted to sell the mortgaged property to Elvin under the statutory power of sale incident to his mortgage. The purchaser's solicitor searched the records of the Bankruptcy Court, and discovered that Death had become bankrupt in 1887. An objection was therefore taken to the title.

The case came before Kekewich J. on vendor and purchaser summons, and his Lordship disallowed the objection, holding that, as the order adjudicating Death a bankrupt was not registered, the mortgagee had a good title to the property as against the official receiver. The purchaser appealed.

A. W. Rowden and *A. H. Carrington*, for the appellant. The question turns upon 7 Anne, c. 20, s. 1. We say that nothing is a "conveyance" within the meaning of that section unless it passes land, or is placed by statute on that footing for the

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for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever.

"(4.) The certificate of appointment of a trustee shall, for any purposes of any law in force in any part of the British dominions requiring registration, enrolment, or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property, and may be registered, enrolled, and recorded accordingly."

By s. 121 the Court, if the official receiver reports that the estate is not likely to exceed 300*l.*, may make an order for its summary administration, and if the debtor is adjudged bankrupt the official receiver is to be the trustee in the bankruptcy.

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purposes of registration. Thus the Trustee Act, 1893, s. 12, sub-s. 4, and the Conveyancing Act, 1881, s. 34, treat a deed containing a declaration which vests trust property as capable of registration. So under the Bankruptcy Acts the certificate of the appointment of assignees or a trustee is made a conveyance for the purpose of registration: Bankruptcy Act, 1849, s. 143; Bankruptcy Act, 1869, s. 83, sub-s. 8; Bankruptcy Act, 1883, s. 54, sub-s. 4. Here there was no certificate, and therefore nothing to be registered. Looking at the rules in the Middlesex Registry (Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64)), an order of adjudication could not be registered, for the property is to be specified and the grantor mentioned, neither of which requisites could be satisfied. The order for summary administration does not carry the matter any further. We accept the wide definition of "conveyance" given by Cairns L.J. in *Credland* v. *Potter* (1), "an instrument which carries from one person to another an interest in land"; but it seems impossible to say that the order of adjudication passed anything to the trustee. What passes passes by force of the Act. *Burrows* v. *Holley* (2) does not throw much light on the question, as it turned on a different section in the Middlesex Registry Act relating to judgments. The title, therefore, is bad.

[It was also urged that the title, if not bad, was too doubtful to be forced on a purchaser.]

Warrington, Q.C., and *Muir Mackenzie*, for the vendor. We submit that the adjudication ought to have been registered, and that as this was not done, the mortgagee, by virtue of the Registry Act, can make a good title. The nearest approach to the present case is *Battersby* v. *Rochfort* (3), where it was held that a general assignment by an insolvent ought to have been registered. That insolvency took place under the old law, while it was still the practice for the insolvent to execute an assignment of his property to a provisional assignee. Such an assignment was perfectly general in its terms. In bankruptcy also a conveyance was made by the bankrupt; but by the Bankruptcy Court Act, 1831 (1 & 2 Will. 4, c. 56), a new system was introduced, and the bankrupt's property was vested in the assignees without a conveyance: ss. 25, 26. Sect. 27 directs that the certificate of the appointment of assignees shall be registered. The reason of this is that the certificate is not what vests the property: that is vested by the appointment, which could not be registered; so the Legislature has directed the certificate to be registered. The subsequent Bankruptcy Acts proceed on the same lines: see Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 17, 18, 83, sub-s. 8. Under the Bankruptcy Act, 1883, s. 20 provides that on a person being adjudged bankrupt his property shall vest in a trustee. Sect. 54 provides—(1.) that the official receiver shall be the trustee for the purposes of the Act, and that immediately on a debtor being adjudged bankrupt his property shall vest in the trustee; (2.) that on the appointment of a trustee the property shall pass to and vest in the trustee appointed; (3.) that the property shall pass from trustee to trustee without conveyance; and (4.) that for the purposes of registration the certificate of appointment of a trustee shall be deemed a conveyance. The registration of the order of adjudication is not provided for, because the property passes by it by virtue of the statute, and therefore by its nature it is capable of registration. This is not inconsistent with the provisions of the Registry Act as to memorials. It is urged, first, that the memorial must express the particulars of the lands; but this goes too far, for after *Battersby* v. *Rochfort* (1) it is clear that an assignment in general terms can be registered. It is urged, secondly, that the memorial must be under the hand of one of the grantors or grantees. That causes no difficulty, for the official receiver is a grantee. The order of adjudication, therefore, might and ought to have been registered; and as this was not done the official receiver is postponed.

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(1) (1874) L. R. 10 Ch. 8.

(2) (1887) 35 Ch. D. 123.

(3) (1846) 2 J. & Lat. 431.

[A reply was not called for.]

LINDLEY M.R. We have had the opportunity of talking this case over, and we are unable to take the same view as the learned judge.

(1) 2 J. & Lat. 431.

The question raised is one of very great importance in dealing with property in Middlesex. The question is whether, if a person who has property in Middlesex is adjudicated bankrupt, the adjudication of bankruptcy is a deed or conveyance which has to be registered under the Middlesex Registry Act (7 Anne, c. 20), and which if not registered will be postponed to a subsequent registered deed executed by the bankrupt.

We have all had some experience in conveyancing and in bankruptcy matters; but I confess that the idea that an adjudication in bankruptcy requires to be registered in Middlesex is an entire novelty to me, and I believe it is so to all of us.

The Act of 7 Anne, c. 20, begins with a preamble stating the evil to be remedied, that " by the different and secret ways of conveying lands, tenements, and hereditaments, such as are ill-disposed have it in their power to commit frauds, and frequently do so." Then it enacts in s. 1 that " deeds and conveyances," whereby lands in Middlesex may be any way affected in law or equity, may be registered as thereinafter directed, and that they shall be void against any subsequent mortgagee or purchaser unless a memorial of them be registered before such subsequent mortgagee or purchaser registers a memorial of his deed or conveyance. Then there is a section shewing what the memorial is to contain. Now, if people accustomed to use language in its ordinary sense were asked whether an order adjudicating a man bankrupt is a deed or conveyance, they would say " Nothing of the sort "; nor is it, and no amount of ingenuity can make it either a deed or a conveyance. It is an order. There are some orders such as vesting orders which amount to conveyances within the Statute of Anne, but we have nothing to do with them: we are only concerned with an order adjudicating a man bankrupt.

In order to see the effect of that order we must look at the Bankruptcy Act now in force—the Act of 1883 (46 & 47 Vict. c. 52). This Act is framed upon lines which are to some extent new. Before 1831 the old machinery in bankruptcy, like the old machinery in insolvency, involved the execution of deeds of conveyance or assignment from the bankrupt to his assignee. When that was the machinery adopted, those deeds of assignment, although they were of all the man's property, came within the very words of the Statute of Anne, and there was nothing in that statute to except them. The statute, therefore, applied to them. But now, when that machinery has been done away with, when there is no conveyance and no deed of assignment, what is there left to come within the fair meaning of the words "deed" or "conveyance" within the Statute of Anne?

The first section of the Bankruptcy Act, 1883, which need be referred to is s. 20, which enacts that, "Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the Court may allow, the Court shall adjudge the debtor bankrupt; and thereupon" (that is, upon the adjudication of the debtor to be a bankrupt) "the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee." Sect. 21 then enacts that, "Where a debtor is adjudged bankrupt, or the creditors have resolved that he be adjudged bankrupt, the creditors may, by ordinary resolution, appoint some fit person, whether a creditor or not, to fill the office of trustee"; and then upon that person being appointed and giving security to the satisfaction of the Board of Trade, a certificate by the Board of Trade is given certifying his appointment. I do not think I need pursue that further. Then s. 54 enacts that, "Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee." The order by which a man is adjudicated a bankrupt, and which by the rules has to be in writing and in a particular form, is simply to the effect that the debtor has been adjudged bankrupt. Is that a deed or a conveyance within the meaning of the Statute of Anne? No doubt the effect of it is that all the property vested in the debtor becomes vested in the trustee; but that does not make it a conveyance. There is

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no grantor, no grantee, and there is nothing which can by the widest stretch of imagination convert it into a conveyance. It is not a deed or a conveyance, neither is it a secret document which requires to be brought within the Statute of Anne in order to give effect to the spirit of that Act, because under the Act of 1883 the adjudication has to be gazetted, and there is nothing secret about it. Anybody can go to the proper office and make the inquiries, which are perfectly well known to those whose duty it is to investigate titles. There is nothing secret about a bankruptcy, and it is not within the mischief sought to be removed by the Statute of Anne.

Reliance was placed by counsel for the vendor on the 4th sub-s. of s. 54, which says that the certificate under s. 21 of the appointment of trustees " shall, for all purposes of any law in force in any part of the British dominions requiring registration, enrolment, or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property, and may be registered, enrolled, and recorded accordingly." Why that was put in I am not prepared to say. In order to understand that it would be necessary to go back more in detail than I have been enabled to do into the previous legislation, and trace out the reproduction in a modern form of an old provision which is to be found in the Act of 1831 (1 & 2 Will. 4, c. 56) and subsequent Bankruptcy Acts. There is, however, this observation to be made—that in 1883, when the Legislature was saying what should be a conveyance or assignment, they omitted the order of adjudication, and said that the "certificate" should be capable of registration. Here there is no certificate; so there is nothing which can by any fair interpretation be brought within the words of the Statute of Anne, and, as I have already pointed out, it is not within the mischief intended to be guarded against by that Act.

Reliance is placed upon some general language of Lord Cairns; but Lord Cairns was there dealing with an equitable mortgage, and his Lordship says it ought to come within the Statute of Anne, and I have no doubt he was quite correct in the extended meaning he gave to the word " conveyance " ; but it would be straining the language to hold that this adjudication of bankruptcy is a conveyance and capable of registration. The objection taken to the title is in my judgment valid, and it is quite unnecessary, therefore, to discuss anything about forcing a doubtful title on a purchaser. In my opinion the vendor has no title against the official receiver. The appeal must, therefore, be allowed with costs both here and below.

Chitty L.J. I am of the same opinion.

The contention of the respondent which was accepted by Kekewich J. is that the order of adjudication was a conveyance within the Statute of Anne, and, not being upon the register, the title of the official receiver must be postponed to that of a subsequent mortgagee from the bankrupt, which mortgage was duly registered. I accept entirely the statement of Lord Cairns in *Credland* v. *Potter* (1), that there is no magical meaning in the word "conveyance," and that it denotes any instrument which carries from one person to another an interest in land. An Act of Parliament would not be within the meaning of that language. Then is the adjudication order on the true construction of the Act of 1883 a "conveyance"? In my opinion it is not.

The principal sections of the Bankruptcy Act, 1883, to be dealt with are the 20th and the 54th. It is by force of the enactment that the property passes, but it passes on the adjudication. It does not pass by virtue of the adjudication so as to make the adjudication order a conveyance. That, I think, is plain on the language of the 20th section, which says "thereupon" the property shall be vested in the trustee. Then, as regards s. 54, sub-s. 4, I think it right to add a few observations. That 4th sub-section appears historically to be a reproduction under a short form of the 143rd section of the Act of 1849, and that section is a reproduction almost in words of the enactment in 1 & 2 Will. 4, c. 56. The Act of Will. 4 allowed the registration of the certificate of the appointment of the assignees in bankruptcy. The old statutes, as is well known, required a deed of conveyance. The Act of Will. 4 substituted a vesting through the statute, and careful

(1) L. R. 10 Ch. 8.

provisions were introduced to shew what should be registered for the purposes of the Registry Acts, the Statute of Anne and other Acts.

By the 54th section of the Act of 1883 it is the certificate of the appointment of the trustees which may be registered, and that is to be deemed to be a conveyance of the property. That was for the sake of convenience. We have, therefore, in this Act of 1883 an express enactment that the certificate of the appointment of a trustee may be registered; but with regard to the order of adjudication there is no such enactment. It follows that the Legislature had its attention directed to the question of what should be deemed to be a conveyance, and what might be registered under the Statute of Anne; but it is nowhere said that the order of adjudication is to be deemed to be a conveyance, nor is one word said about it being registered. I agree with the Master of the Rolls that I never heard of the registration of adjudications in bankruptcy. To sum up my remarks on this point, it is by the force of the statute that the property passes, not by virtue of the order as if it was a conveyance. I say nothing about the vesting orders that are made by the Court under the Trustee Act, because they are not before us.

The result is that I agree with the Master of the Rolls that this order cannot stand on the general point that has been argued. It therefore becomes unnecessary to say anything about the question of doubtful title, or of forcing a lawsuit on the purchaser.

COLLINS L.J. I am of the same opinion, and I cannot usefully add anything to the reasons that have already been given.

Solicitors: *Percy C. Ray; G. & P. Calcott.*

H. C. J.

WALL *v.* LONDON AND NORTHERN ASSETS CORPORATION.

[1898 W. 1178.]

C. A.
1898
July 27.

Company—Sale of Assets—Amalgamation—Distribution of Consideration—Meeting of Shareholders—Closure.

The objects of the A. Company as stated by art. 3 of its memorandum were (inter alia) (*a*) to raise capital and invest it in such bonds, stocks, and securities as therein mentioned; (*i*) to sell any part of the assets and to accept the consideration in cash, shares, or other securities, and to divide any assets of the company in specie among its shareholders; (*o*) to amalgamate with any persons, companies, or firms carrying on business of a like nature. The D. Company carried on a similar business. The A. Company agreed with the D. Company to sell to the D. Company all its assets (except 3325 2*l.* shares in the D. Company which the A. Company held) for 60,991*l.*, to be satisfied as to 59,736*l.* by allotment of 29,868 fully paid-up shares of 2*l.* each in the D. Company, and the balance of 1255*l.* in cash or fully paid-up shares at the option of the A. Company. It was provided by the agreement that the shares so allotted and the shares in the D. Company already held by the A. Company were to be divided among the shareholders of the A. Company in manner therein mentioned. It was doubtful whether the mode of division was not illegal as interfering with the rights of the shareholders under the memorandum and articles:—

Held, that the proposed sale being a sale of the assets of the A. Company with a substantial exception was within (*i*), and that the transaction was also warranted by (*o*) as being an amalgamation:

Held, also, that the proposed division of shares, being a matter with which the D. Company had nothing to do, did not, even if illegal, affect the validity of the agreement for sale, and that an interlocutory injunction to prevent the A. Company from carrying the agreement into effect had been properly refused on an undertaking by the A. Company not to divide the shares till after the trial otherwise than in accordance with the rights of the shareholders under the memorandum and articles.

At a meeting of shareholders it is not competent to the majority to come determined to vote in a particular way on any question, and to refuse to hear any arguments to the contrary; but when the views of the minority have been heard, it is competent to the chairman with the sanction of a vote of the meeting to declare the discussion closed and to put the question to the vote.

At a meeting held to confirm a resolution passed by the requisite majority at a former meeting so as to make it a special resolution, it is irregular to propose an amendment to that resolution.

Decision of Stirling J. affirmed.

THE London and Northern Assets Corporation (hereinafter called "the Assets Company") was registered as a limited company in 1888. In 1892 its capital was duly reduced to 200,000*l.*

divided into shares of 2*l*. At the time of the transactions to which this action relates the issued capital consisted of 104,608*l*., divided into 52,204 ordinary shares of 2*l*. each, and 100 founders' shares of 2*l*. each, upon each of which ordinary and founders' shares 1*l*. 10*s*. had been paid.

The memorandum of association by art. 3 stated the objects of the company to be: "(*a*) To raise money by share capital, and invest the amount thereof in, or otherwise acquire and hold, any such bonds, stock, obligations, or securities as therein mentioned . . . . (*i*) To sell, lease, convert into money, barter, or otherwise dispose of any portion of the assets, estates, and effects of the company, and for such purposes carry on, work, or develop any property or business of any kind in which the company may be interested, or to concur with others in so doing, or employ others so to do, as may be found expedient; and, in consideration or part consideration for any dealing with the property of the company under this clause, to accept either cash or shares, debenture stock, mortgage debentures, debentures, or other securities of any co-partnership or person with whom this company may have dealings, and to divide any assets of the company among its members in specie . . . . (*o*) To amalgamate with any persons, companies, or firms carrying on business of a like or similar nature, or to acquire any such business or interest therein either by purchase or otherwise, and to accept payment, as may be found expedient." The amount in each year applicable to dividend was to be applied in payment of a dividend of 7½ per cent. per annum on the amount called up and paid on the ordinary shares, and the surplus was to be divided, half among the founders' shares, and half among the ordinary shares.

By clause 53 of the articles of association a poll at any meeting of shareholders was only to be granted on a demand in writing by five members present and entitled to vote at the meeting, and no poll could be taken on any question of adjournment.

The London and Northern Debenture Corporation (hereinafter called "the Debenture Company") was incorporated in 1889 as a limited company. In 1892 its capital was duly reduced to 200,000*l*. in shares of 2*l*. Its issued capital at the time of these transactions was 69,400*l.* divided into 34,700 shares all fully paid up. Of these shares, 34,600 were ordinary, and 100 were founders' shares.

At the time of entering into the agreement next hereinafter mentioned the assets of the Assets Company included 3315 ordinary shares and ten founders' shares of the Debenture Company.

The directors of the two companies were the same persons, and upon the whole they had a larger interest in the Debenture Company than in the Assets Company, and some of the shareholders in the Assets Company were in the same position. The business of the two companies was of the same nature.

By an agreement dated February 11, 1898, made between the Assets Company (thereinafter called the vendor) of the one part, and the Debenture Company (thereinafter called the purchaser) of the other part, after recitals to the effect of the above statements, it was agreed as follows: (1.) "The vendor shall sell and the purchaser shall purchase all the assets of the vendor except the said 3315 ordinary shares and ten founders' shares of the purchaser now registered in the name of the vendor." (2.) "The consideration for the said sale shall be the sum of 60,991*l.*, which shall be satisfied as to 59,736*l.* by the allotment to the vendor or its nominees of 29,868 fully paid ordinary shares of 2*l.* each in the capital of the purchaser, and the balance of 1255*l.* in cash or fully paid ordinary shares of the purchaser, at the option of the vendor or its nominees. In the distribution between the members of the vendor of the said shares and of the shares in the purchaser retained by the vendor, each holder of the founders' shares shall receive six and a half shares of 2*l.* each, or thirteen shares of 1*l.* each, as the case may be, in respect of each founders' share, and the residue of such shares and cash shall be divided amongst the holders of the ordinary shares in proportion to the number of such shares respectively held by them." The purchase was to be completed on or before April 15 then next. The agreement was made conditional upon its being approved before a certain date by resolutions passed at extraordinary general meetings of the two companies respectively.

The market value of shares in the Debenture Company was considerably below their nominal amount.

An extraordinary general meeting of the Assets Company was held on February 22, 1898, at which a resolution approving of the agreement of the 11th was moved and seconded. The meeting was adjourned to March 22, when, after the chairman had addressed the meeting, Mr. Wall entered into an explanation of his objections to the scheme. Mr. Parker pointed out the advantages of the scheme, and the objections to the schemes outlined in a circular of Mr. Wall. A Mr. Rowley was speaking against the schemes, both of the directors and of Mr. Wall, but was interrupted by cries of "Vote." The chairman then, supported by others, put a motion that the debate should then close, and there voted 24 in favour of the motion and 2 against it. The chairman then put the resolution, which was carried by 35 to 3. Mr. Wall expressed his wish for a poll, but could not obtain the support of four other members present for demanding it, and the chairman declared the meeting closed. The above is the substance of what appears in the minutes of the meeting. Mr. Wall deposed that, "Shortly after the discussion of the scheme had begun, and while I and other shareholders were desirous of addressing the meeting, the chairman put a resolution to the meeting that the discussion should be terminated. This resolution was carried, and those shareholders who were desirous of speaking were thus prevented from so doing."

On April 6 an extraordinary general meeting was held for the purpose of confirming the resolution. The chairman referred to a notice of amendment received from Mr. Wall, which was as follows: "That the following be added to the resolution confirming contract—'Subject to the purchaser agreeing to allow any individual or any body of dissentient shareholders to have their share of the assets agreed to be sold in lieu of the London and Northern debenture shares due to them.'" The chairman ruled that the amendment could not be put, and moved that the resolution of March 22 should be confirmed. This motion was seconded. The minute of the meeting proceeded as follows: "Mr. Rowley expressed his

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views against the resolution, and also against the suggestions made by Mr. Wall in his circulars. Mr. Timmis moved the adjournment of the meeting for a fortnight or three weeks. Major Baker objected to any adjournment, pointing out that the resolution had been before the shareholders since February 22, and pressed for the vote of the shareholders to be taken at once. Mr. Wall spoke in favour of adjournment, when certain shareholders suggested that further discussion on the question of adjournment should be terminated, and the voting on the motion for adjournment taken at once. The chairman left this to the meeting to decide, and 16 members voted that the discussion be terminated, and 8 against. Thereupon a demand for a poll was handed in by Mr. Wall, who claimed that discussion on the question should not be suppressed. The chairman ruled that no poll could be demanded. Mr. Wall, having protested against the decision of the chairman, continued his remarks at some length upon the desirability of an adjournment, and seconded the motion of Mr. Timmis. The chairman put to the meeting the motion for the adjournment, when there voted 8 in favour of the adjournment, and 19 against. The chairman thereupon declared the motion for the adjournment lost. The chairman then put the original resolution, of which notice had been given, as moved by him, when there voted 20 for the resolution, and 5 against, and the chairman declared the resolution carried." Mr. Wall handed in a demand for a poll signed by himself and four other parties present, and it was fixed for April 13.

The result of the poll was :—

For the resolution.	Persons.	Votes.
Voting in person . .	10	2,243
,, by proxies . .	178	23,350
	188	25,593
Against.		
Voting in person . .	7	1,936
,, by proxies . .	59	8,930
	66	10,866

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On April 15 Mr. Wall commenced an action, on behalf of himself and all other shareholders in the Assets Company except those who had voted for the resolution, against the Assets Company and its directors, asking a declaration that the special resolution which the company purported to pass on March 22, 1898, and to confirm on April 13, 1898, and the agreement therein referred to, were ultra vires, void, and invalid, and an injunction to restrain the defendants from acting upon the resolution. The plaintiff moved for an injunction. Stirling J. decided that the Assets Company had power to make the sale, that it was not invalidated on the ground that the directors were largely interested in the Debenture Company, and that there had been no such irregularities in the meeting as to vitiate the resolution. His Lordship was disposed to think that the proposed mode of distributing the shares of the Debenture Company among the shareholders of the Assets Company was illegal, as interfering with the relative rights of the holders of founders' and ordinary shares, as settled by the memorandum of association, but considered that such illegality, if it existed, did not invalidate the sale. His Lordship, therefore, on the defendants giving an undertaking not to distribute these shares before the trial otherwise than in accordance with the rights of the shareholders given by the memorandum and articles of the Assets Company, refused the motion, making the costs costs in the action.

The plaintiff appealed.

W. H. Cozens-Hardy, for the appellant. We appeal on three grounds: (1.) that the resolution and the scheme were ultra vires; (2.) that if not ultra vires, the resolutions are bad as having been passed irregularly; (3.) that if the scheme is not wholly void, the illegal is so mixed up with the legal that they cannot be severed, and the scheme is invalid. The proceeding was not a sale under s. 161 of the Companies Act, 1862, and does not profess to be so. The defendants say—(1.) that this is a sale authorized by the memorandum; (2.) that there is a special resolution altering the rights; (3.) that it may be supported as an amalgamation. It cannot be a valid sale, for

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the memorandum does not authorize a sale of the whole assets. It cannot be supported as an amalgamation. Art. 3 (*o*) of the memorandum contemplates an amalgamation by purchase, not by sale, and there is no case where a sale of a business and assets has been held an amalgamation. In *Higgs's Case* (1) Lord Hatherley says that he cannot give a definition of "amalgamation," but holds that a power to amalgamate does not enable a company to execute the deed of another company so as to make the shareholders subject to the liabilities of that company. His Lordship suggests amalgamation to be where both companies resolve to abandon their respective articles of association, and to register themselves under new articles as one body. Lord Davey expresses himself to the same effect in *New Zealand Gold Extraction Co.* v. *Peacock* (2), and so does Kennedy J. (3) In *Imperial Bank of China, India and Japan* v. *Bank of Hindustan, China, and Japan* (4) it was decided that the transfer of the whole business to another company in consideration of shares in the latter was not an amalgamation, but a sale and transfer; and in no case has amalgamation been held to include a transaction like this. In the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), ss. 14, 15, a broad distinction is made between amalgamation and transfer, which are there treated as two distinct things; and in Buckley on Companies, 7th ed. p. 426, the same view is taken. As to illegality, the scheme provides in effect that the holders of founders' shares shall receive ten times as much as the ordinary shareholders. That is void as being an alteration of the rights defined by the memorandum. Some of the directors and shareholders are interested in both companies, and the directors are more largely interested in the Debenture Company than in the Assets Company. The Court, therefore, ought to be on its guard against any oppression of the minority by the majority. The consideration is to be paid in shares which are treated as worth their nominal value, whereas they are worth much less.

[LINDLEY M.R. Is not the adequacy of the consideration a matter for the shareholders only?]

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(1) (1865) 2 H. & M. 657, 666.
(2) [1894] 1 Q. B. 622, 632.
(3) [1894] 1 Q. B. 627.
(4) (1868) L. R. 6 Eq. 91.

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Menier v. *Hooper's Telegraph Works* (1) and *Kaye* v. *Croydon Tramways Co.* (2) shew that the Court will interfere where the majority are treating the minority unfairly. Then we say that the resolutions were irregularly passed. The chairman applied the closure. Then as to the distribution of shares, it is clearly illegal, and makes the contract void: *Hopkins* v. *Prescott* (3); for the Court cannot sever the illegal part where to do so would make a new agreement: *Baker* v. *Hedgecock* (4); *Hattersley* v. *Earl Shelburne.* (5) In *Griffith* v. *Paget* (6) the question of severance was never argued; and at the trial (7) it turned out that less was given to the deferred shareholders than they were entitled to; so the plaintiff had no ground of complaint. In *Simpson* v. *Palace Theatre, Limited* (8), it does not appear whether the question of severance was raised, but if it was, severance was not allowed.

Jenkins, Q.C., and *W. F. Hamilton*, for the Assets Company. Admitting, for the purposes of this motion, that the proposed mode of distribution may at the trial be held illegal, we say that it is only a matter between the shareholders of the Assets Company inter se, and has no bearing on the bargain between the two companies. We say that this transaction is authorized by the memorandum as a sale or as an amalgamation. It is good as a sale, for it is not a sale of the whole undertaking, as the Assets Company retains a substantial number of shares of the Debenture Company. It is a sale of a specified part of the assets of the Assets Company. In the Life Assurance Companies Act, 1870, ss. 14, 15, a transfer is spoken of where one company carries on some other business. An admitted case of amalgamation is where two companies transfer their businesses to a third company formed for the purpose. The notion of a sale is involved in every amalgamation, for a limited company cannot dispose of its assets except for value. In the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 37, the transfer of the business of one company to another existing

(1) (1874) L. R. 9 Ch. 350.
(2) [1898] 1 Ch. 358, 374.
(3) (1847) 4 C. B. 578.
(4) (1888) 39 Ch. D. 520.
(5) (1862) 31 L. J. (Ch.) 873.
(6) (1877) 5 Ch. D. 894.
(7) (1877) 6 Ch. D. 511.
(8) (1893) 69 L. T. 70.

company is treated by the Act as amalgamation: Buckley on Companies, 7th ed. p. 426; Lindley on Companies, 5th ed. p. 891. We ask the Court to say that it is not necessary to amalgamation that a third company should be formed for the purpose. If this is not an amalgamation it is a sale; but we rely on its being authorized as an amalgamation. It is impossible to look at the validity of the resolutions apart from the validity of the agreement. The agreement was conditional on its being approved by meetings. It is said some would not have voted for it if not accompanied by a scheme of distribution. Anyhow, they did vote, and the condition is fulfilled. Their main motive was to get rid of the liability to pay the remaining 10*s.* per share. Then a question is raised as to the validity of the distribution. The Debenture Company can say to the Assets Company, "That was no part of the bargain between you and me: it was put into the agreement because you wished to bring it before your shareholders; but it was no part of our bargain, and does not affect its validity." *Griffith* v. *Paget* (1) is in our favour.

[They were stopped by the Court.]

W. H. Cozens-Hardy, in reply. The company can only sell when there is an express power in the memorandum. Here the memorandum does not say "the whole or any part."

[CHITTY L.J. They are not selling the whole.]

They are substantially selling the whole, for it is all that the Debenture Company could purchase. Palmer's Company Precedents, 7th ed. p. 1156, does not suggest that there can be an amalgamation under a power to sell part of the assets. The company cannot do under clause (*i*) what they are expressly authorized to do under clause (*o*). The scheme of distribution was part of the consideration, and its illegality taints the whole bargain.

LINDLEY M.R. I think that the conclusion arrived at by Stirling J. is correct.

The London and Northern Assets Corporation, Limited, had nothing in the shape of an undertaking to work. It had not a railway, a tram, a canal, a factory, or anything of that kind. It was what is called a finance company, whose object was to speculate in shares and other securities. Its assets consisted of the various investments appearing on the balance-sheet which was put in evidence. Art. 3 of the memorandum of association says: "The objects for which the company is established are, . . . (*i*) To sell, lease, convert into money, barter, or otherwise dispose of any portion of the assets, estate, and effects of the company, and for such purposes to carry on, work, or develop any property or business of any kind in which the company may be interested . . .; and, in consideration or part consideration for any dealing with the property of the company under this clause, to accept either cash or shares, debenture stock, mortgage debentures, debentures, or other securities of any co-partnership or person with whom this company may have dealings, and to divide any assets of the company among its members in specie." The assets consist of investments, and amongst other investments the company had 3315 ordinary shares and ten founders' shares in the London and Northern Debenture Corporation. That is not a bagatelle. I do not know what they are worth, and it is not necessary to inquire. The agreement they make is this: to sell to the Debenture Corporation all their assets except their shares in the Debenture Corporation. I am not prepared to hold that the 3325 shares of the Debenture Corporation are to be treated as a trumpery exception, and, if they are not, the case appears distinctly to come within clause (*i*).

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(1) 5 Ch. D. 894.

I am also not prepared to say that it does not come within clause (*o*), which states as one of the objects of the company, "To amalgamate with any persons, companies, or firms carrying on business of a like or similar nature, or to acquire any such business or interest therein either by purchase or otherwise, and to accept payment as may be found expedient." No very precise meaning can be given to the word "amalgamate" when we talk about amalgamating a company with any persons, companies, or firms, and I confess that I am not prepared to put any sharp definition upon the word. I have no doubt that it includes the case put by Lord Hatherley in *Higgs's*

Case (1), and more recently by Lord Davey in *New Zealand Gold Extraction Co.* v. *Peacock*. (2) I do not think it involves the formation of a new company to carry on the business of an old company. I have no doubt it includes that; but I do not think it is confined, or understood to be confined, to that. I do not see how a company as a business transaction can practically amalgamate with persons or companies carrying on business unless the company in some way or other sells its assets as a whole—not for money, for that would be a simple sale—but for shares in the purchasing company. Therefore, if a larger power of transferring assets than is found in clause (*i*) is wanted it is, in my judgment, found in clause (*o*). As it appears to me, the real foundation of the appellant's argument fails, and this transaction is not ultra vires so far as regards the sale of the assets.

Another point was made by Mr. Cozens-Hardy in his argument with his usual ability—that the consideration for the purchase under this deed is illegal. Of course, if that is true it is a very serious matter. The consideration for the purchase is stated in clause 2 of the agreement as "60,991*l*., which shall be satisfied as to 59,736*l*. by the allotment to the vendor or its nominees of 29,868 fully paid ordinary shares of 2*l*. each in the capital of the purchaser, and the balance of 1255*l*. in cash or fully paid ordinary shares of the purchaser, at the option of the vendor or its nominees." There is nothing illegal in that. It is a straightforward business transaction. Then clause 2 goes on: "In the distribution between the members of the vendor" (the Assets Company) "of the said shares, and of the shares in the purchaser retained by the vendor, each holder of the founders' shares shall receive six and a half shares of 2*l*. each, or thirteen shares of 1*l*. each, as the case may be, in respect of each founders' share, and the residue of such shares and cash shall be divided amongst the holders of the ordinary shares in proportion to the number of such shares respectively held by them." Now it is said that that distribution of what I will call the purchase-money is inconsistent with the memorandum of association of the Assets Company. I am not prepared to say offhand, nor has Stirling J. said, whether it is so or not. He has reserved that question to be disposed of at the trial; but in the view that I take it certainly does not taint the consideration with illegality. I think, upon the authority of the case of *Griffith* v. *Paget* (1), upon which Stirling J. acted, he was quite justified in saying that the clause as to the distribution does not affect the validity of the agreement. On that point, therefore, I think that Stirling J. has done all that is necessary. That disposes of the substance of the case.

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(1) 2 H. & M. 657.

(2) [1894] 1 Q. B. 622.

Then Mr. Cozens-Hardy raised various points of irregularity, which I shall dispose of very shortly, because I think they mostly are not points with which this Court has anything to do. The only new one is the point about the closure. It appears that there was a discussion about this matter at a meeting of shareholders of the Assets Company, and, after having heard the views—I do not say of all those who opposed, but of one or two of them—the meeting came to the conclusion that they had heard enough, and did not want to hear any more, and thereupon the chairman declared the discussion closed. That is said to be a matter calling for the interference of this Court. I do not think so. I think it would be a very bad precedent that we should interfere in such a case. I am aware of the importance of the observations made by Lord Eldon in *Const* v. *Harris* (2), in which he said (3), "I call that the act of all" (he was speaking of the meeting of large companies), "which is the act of the majority, provided all are consulted, and the majority are acting bonâ fide, meeting, not for the purpose of negativing, what any one may have to offer, but for the purpose of negativing, what, when they are met together, they may, after due consideration, think proper to negative: For a majority of partners to say, We do not care what one partner may say, we, being the majority, will do what we please, is, I apprehend, what this Court will not allow." I think that principle is as important, and, perhaps, more important, to bear in mind now than it was sixty or seventy years ago; but Lord Eldon does not mean that a minority who are bent on obstructing business

(1) 5 Ch. D. 894.

(2) (1824) T. & R. 496.

(3) T. & R. 525.

and resolved on talking for ever should not be put down. He means that the majority are not to be tyrannical. After hearing what is to be said, they may say, "We have heard enough. We are not bound to listen till everybody is tired of talking and has sat down." There is no reason for supposing that there was any terrorism in this matter, and this appeal must be dismissed with costs.

CHITTY L.J. I am of the same opinion. I think, also, that the agreement may be supported under clause (*i*) of the memorandum, having regard in this case to the nature of the Assets Company—that is to say, a company that has nothing which in ordinary language can be called an undertaking. It has not a mine, nor even a business. It has not, as far as I can see, any goodwill; but the nature of its operations is shewn by the earlier words describing the objects of the company, and by the balance-sheet which has been referred to, and which in point of fact shews how this company has been worked—namely, by buying stocks, shares, bonds, and securities, and many other kinds of property mentioned in the memorandum. They have carried on a business of that kind, and they have no doubt sold again what they have bought. The object was to make a profit in that particular way. Then clause (*i*) authorizes the selling of any portion of the assets, estates, and effects of the company; and, as I have said, they had no undertaking to sell, and what they have sold by this agreement is a portion of the assets, estates, and effects. The exception that is made is not an exception merely for the purpose of saying that there is an exception. It is a substantial matter, and it is of no avail, in my opinion, to say that the exception includes that which could not have been sold to the purchasing company, because the purchasing company had no power to buy its own shares. So much for that point.

Then with regard to amalgamation. I agree that the term has no fixed meaning in point of law. You have to see how the term is used in the particular document that has to be construed. I have referred during the argument to Mr. Palmer's book, not as an authority, but for the purpose of seeing how

Chitty L.J.

a gentleman well versed in the ordinary business of forming companies and amalgamating companies, and dealing with companies from the lawyer's point of view, treated the subject, and I find that among his precedents of amalgamation he includes what is really a sale and transfer.

In this case there is a sale of the assets with the exception that I have mentioned, and there is, I think, an amalgamation in this sense—that the purchasing company gives to the selling company shares in itself to be distributed according to the clause which I shall mention presently. That seems to me in the ordinary and reasonable sense of the term, and certainly in the sense in which it is used in this article, to be an amalgamation. In strictness I do not understand how you can amalgamate two corporations having each a separate existence. It has been suggested by Mr. Cozens-Hardy in a very excellent argument that one way (and I agree with him so far) is to form a third company. That is not, in any strict sense, an amalgamation of two companies. The two companies sell and transfer their undertakings to a new entity—that is, a third company established for that purpose; and then the two companies which are said to be amalgamated with this new entity vanish out of existence and wind themselves up and disappear. The term cannot be said to have any strict legal sense, but in this memorandum and in this particular clause (*o*) there is an amalgamation mentioned, not of companies, but a power to amalgamate with any person or company. How can a company amalgamate with a person in any reasonable sense of the term, unless you put a wider meaning upon it than Mr. Cozens-Hardy was willing to do?

I quite agree with what the Master of the Rolls has said, and with the judgment of Stirling J., that this transaction is within the authority and the power conferred by the memorandum.

Then, in the clause of the agreement relating to the consideration, there occurs a statement of how the consideration is to be distributed amongst members of the selling company. As to that clause, in my opinion there was some irregularity in putting it in, for it forms no part of the bargain between the two companies. I think that it is a clause with which the purchasing company has nothing to do; it could not demand specific performance, or sue for the enforcement, of that clause. It is a clause which concerns only the selling company and its shareholders. Stirling J. has reserved, and we propose to reserve, the question of how far effect can be given to that clause. As this is not the trial, we need not decide the question now. I leave that question upon the undertaking which was given by Mr. Jenkins and accepted by Stirling J., and although it differs from the wording of the undertaking given in *Griffith* v. *Paget* (1), I think that it is substantially sufficient for the purpose of this case.

As to Mr. Cozens-Hardy's "irregularities," which he put to us very strongly, it appears to me that this Court ought not to interfere in the internal affairs of this or any other company on any such ground as he suggested.

As to the closure, I think if we laid it down that the chairman, supported by a majority, could not put a termination to the speeches of those who were desirous of addressing the meeting, we should allow a small minority, or even a member or two, to tyrannize over the majority. The case has been put by Mr. Cozens-Hardy as the terrorism of the majority. If we accepted his proposition we should put this weapon into the hands of the minority, which might involve the company in all-night sittings. That seems to me to be an extravagant proposition, and in this particular case there seems to have been nothing arbitrary or vexatious on the part of the chairman or of the majority. I am not, of course, saying that the majority must not listen to reasonable arguments for a reasonable time. I will advert only to one other point, and must be excused for not going into the other "irregularities" which Mr. Cozens-Hardy has mentioned. He said that it was wrong of the chairman to refuse to put to the meeting, merely held for the confirmation of the original resolution passed by three-fourths of the proprietors, another resolution by way of amendment. His refusal, in my opinion, was right, because that meeting was called for one purpose only, and that was to confirm or reject the original resolution which had been passed, and any

(1) 5 Ch. D. 894.

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amendment would be wholly irrelevant, because the single purpose of the meeting was to say Aye or Nay, is the original resolution to stand or fall?

COLLINS L.J. I am of the same opinion.

Solicitors: *A. E. Greville; Baker, Blaker & Hawes.*

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NEW IXION TYRE AND CYCLE COMPANY *v.* SPILSBURY.

[1897 N. 1440.]

Patent—Licence—Agreement for Sale—Assignment—Registration—Title—Priority—Notice—Equitable Rights—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 23, 87.

By an agreement in writing W., the registered proprietor of a patent, agreed for value to assign it to the plaintiffs. Before that agreement had been registered W. granted a licence to use the patent to S., who forthwith registered the licence. S., before he took his licence, was informed by W. of the agreement with the plaintiffs, which W. stated to be no longer in force. Subsequently the plaintiffs registered their agreement and took an assignment, which they duly registered:—

Held, affirming the decision of Kekewich J., that under the proviso in s. 87 of the Patents, Designs, and Trade Marks Act, 1883, S., having had before he took his licence express notice of the plaintiffs' agreement, could not assert against them his legal title by prior registration, and that the licence was void as against the plaintiffs.

THIS was an appeal by the defendants from a judgment of Kekewich J. (1), declaring a licence to work a patent void as against the plaintiffs, and granting an injunction.

By an agreement of June 24, 1896, John Forrest Walters, the registered proprietor of certain letters patent relating to pneumatic tyres, agreed to transfer them and other property to the plaintiffs, the assignment to be completed on July 31, 1896, or as soon as practicable thereafter. This agreement was not at first entered on the register of patents, but the letters patent were at once delivered to the plaintiffs. In the same year,

(1) Ante, p. 137.

1896, a company called the Pneumatic Tyre Company, Limited, commenced an action, to which the Dunlop Tyre Company were afterwards added as co-plaintiffs, against Walters under his trade name of the Ixion Patent Pneumatic Tyre Company, alleging that machines made according to the above letters patent were infringements of certain letters patent vested in them. The present plaintiffs, the New Ixion Tyre and Cycle Company, though they had not yet taken an assignment, defended this action on behalf of Walters, and on August 4, 1897, Wills J. decided against the Dunlop Company, holding that the manufacture of machines under the letters patent registered in the name of Walters was no infringement of the letters patent in which the Dunlop Company were interested.

On September 16, 1897, Walters, who insisted that the agreement of June 24, 1896, was at an end, granted a licence to Spilsbury and three others to work his letters patent. This licence was duly registered on September 18, 1897. Spilsbury and the other licensees, before the licence was granted, were told by Walters of the agreement of June 24, 1896, which he stated to them to be no longer binding on him.

On September 27, 1897, the agreement of June 24, 1896, was entered on the register.

On October 6, 1897, Spilsbury and the other licensees transferred their rights under the licence to the Licensed Tyre Syndicate, Limited.

On October 20, 1897, Walters by deed assigned the letters patent to the plaintiffs, and the assignment was duly registered.

Kekewich J. decided that the title of the plaintiffs had priority over the licence, and that the licence was void as against them.

The defendants appealed.

Warrington, Q.C., and *Austen-Cartmell*, for the appellants. There was such delay that the agreement of June 24, 1896, could not have been enforced against Walters. The proviso at the end of s. 87 of the Act of 1883 must be construed in connection with the former part of the section, and so as to allow full effect to be given to its scope, and the effect is that, although the person on the register can make a good title as against any one whose title does not appear on the register, any equity can be enforced against him. In the Merchant Shipping Act, 1894, there is an express provision that mortgages shall rank according to the order of their registration without regard to notice, and there is in s. 57 a provision similar to that at the end of s. 87 of the Act of 1883. That cannot be construed so as to give an unregistered mortgagee rights against a registered one.

[Chitty L.J. On the present occasion we have no need to construe that Act.]

That provision at all events shews that the Legislature saw no inconsistency between a provision that mortgages should rank according to order of registration and a provision that equities might be enforced. The proviso ought not to be construed to enable any person not on the register to enforce an equity against the registered owner. If, however, it is so construed, the equity to be asserted ought to be a strong equity; whereas here the plaintiffs are in default for not registering their agreement. It was their duty to have it registered, and they give no explanation why they did not.

Renshaw, Q.C., and *Rowden*, for the respondents, were not called on.

Lindley M.R. I think the case is as plain as any such case can be both upon the facts and upon the law.

The question really turns upon the validity as against the plaintiffs of the licence granted to the first four named defendants, Major Spilsbury and others, by Mr. Walters on September 16, 1897. Walters was the registered owner of the patent which is in question, and on June 24, 1896, he agreed for value to assign it to the plaintiff company. The assignment was to be completed (there were other matters agreed to be assigned) on July 31, 1896, or as soon as practicable thereafter. It appears that there was litigation going on between the Dunlop Company and Walters respecting his right to exercise and work this patent, which the Dunlop Company alleged to infringe a previous patent of theirs, and so long as that litigation was going on it would have been obviously unbusinesslike, to say the least, for the plaintiffs to spend money in perfecting the assignment of that particular patent, and consequently they did not. But they did not abandon the agreement into which they had entered. Far from it. They fought the action against the Dunlop Company and defended Walters' patent, and were exercising their rights as far as the circumstances would allow under the agreement of June 24, 1896. It would have been quite impossible for Walters in September, 1897, when that litigation was over and when the Dunlop Company had been defeated, to have resisted a demand by the plaintiffs for an assignment by him to them of that patent pursuant to the agreement of June, 1896. To say that it was abandoned, or that Walters could have had any possible defence on the ground of lapse of time or any other ground which has been brought to our attention, would have been absolutely hopeless. It is impossible, therefore, to say that the agreement was abandoned, or that it was an agreement which could not have been enforced by the plaintiff company against Walters in September, 1897. Now, in September, 1897, Walters, who seems to have thought and said that the agreement was not binding upon him, granted a licence to Major Spilsbury and others. They had full notice of the agreement of June, 1896, and it is not denied that they had been told by Walters of that agreement, and had been led by him to believe that it was at an end. They took the precaution, we are told, of going to look at the register, and they found Walters still on the register; but they did not make any inquiries from the persons interested under that agreement, and they took their chance of acting upon what Walters had told them. They had notice, and the notice is clear and distinct. After that, on September 18, 1897, the licensees registered the licence, and on September 27, 1897, the plaintiffs registered the agreement of June, 1896. What is the position of affairs? Who is entitled to work this patent? Are the licensees entitled to work it under their licence of September 16, 1897? They unquestionably would be if they had not had notice of the agreement; but as they had notice before taking their licence, who is entitled to work the patent? That depends upon the true construction of the Patent Act, 1883, as amended by the Act of 1888. Mr. Cartmell has argued and insisted that under s. 23 the patentee or any person entitled to the patent is under some duty to the public to register it. I understand the words "shall be entered" in s. 23 as addressed to the registrar. It is his business. He has to keep the register, but there is no obligation on the assignee of a patent to register the assignment if he does not wish to do so. Of course if he does not register he takes his chance of having his title defeated by some one else who does; but there is no breach of any duty in not registering.

Now, let us look at s. 87, the important part of which is this: "The person for the time being entered in the register of patents, designs or trade-marks, as proprietor of a patent, copyright in a design or trade-mark as the case may be, shall, subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licenses as to, or otherwise deal with, the same and to give effectual receipts for any consideration for such assignment, license, or dealing." If the Act had stopped there it would be very questionable whether notice could avail anybody. If it had stopped there, Walters, being the registered owner, might have been entitled under that statutory provision to grant licences without regard to the rights of anybody with notice or without. But the section does not stop there. It proceeds: "Provided that any equities in respect of such patent, design, or trade-mark may be enforced in like manner as in respect of any other personal property." That lets in the whole doctrine of notice and the equitable consequences of it. That proviso cannot be cut down. When it says that "equities in respect of such patent" it cannot mean registered equities, for they have already been provided for. It means that any equitable rights in any person in respect of such patent may be enforced in like manner as in respect of any other personal property. That, to my mind, removes all possible difficulties on any point of law.

I think, therefore, that the learned judge was right, and that the appeal must be dismissed with costs.

Chitty L.J. I am of the same opinion. The agreement of June 24, 1896, was a valid agreement between the parties for valuable consideration. It has not been released or abandoned. In fact, no better evidence on such point than this can be adduced, that the purchasers under that agreement, for the purpose of perfecting their own title, defended an action which was brought by the Dunlop Company against the patentee Walters, in which action they succeeded, and that action was going on until August 4, 1897.

The next point is the notice. The notice was not constructive, but actual, which is required where it is sought to defeat the statutory priority acquired by registration, as has been decided under the Middlesex Registry Act. The persons who took the licence appear to have allowed Mr. Walters to give them some advice, and to have acted upon some loose statements or suggestions that he made. They searched the register and did not find the agreement of June, 1896. Of course, it is unquestionable that if there is a suggestion made by a person in Walters' position that the agreement has come to an end, or is not sound, or any loose statement of that kind, the person who had notice must go to those who can give the answer—namely, in this case to the company who became the purchasers under that agreement.

So much for the facts. We are only applying here the well-known doctrine of *Le Neve* v. *Le Neve* (1)—that the Court will not, as Lord Hardwicke said, allow a person to take advantage of the legal form appointed in the Act of Parliament to protect himself against the person who had prior equities of which he had actual notice.

Then with regard to the 23rd section, I think Mr. Cartmell put his case a great deal too high. There is no statutory obligation to register. Of course, the man who does not register an agreement to assign a patent to him runs great risk, because his equitable agreement is not on the register, and if some one without notice of it buys from the patentee and registers his assignment, the result is that the person who bought first loses his title.

(1) (1748) 3 Atk. 646.

Then as to the 87th section, the proviso appears to me to keep all equities in respect of the patent open, so that they may be enforced in like manner as in respect of any other personal property. As has been pointed out by the Master of the Rolls, the part of the section immediately preceding the proviso shews that the title of the registered proprietor is subject, not merely now under the Act of 1888, but under the Act of 1883, as originally framed, to any rights appearing from the register to be vested in any other person. It is impossible, therefore, to cut down the proviso by saying that it is applicable only to equities appearing on the register.

Collins L.J. I am of the same opinion, and I have nothing to add.

Solicitors: *Foster Grave & Co.; Foss & Ledsam; Lewis & Lewis.*

H. C. J.

THE OXFORD, LIMITED v. LONDON COUNTY COUNCIL.

NORTH J.
1898
July 15.

[1898 O. 1023.]

London County Council—"Improvement Charge"—"Improvement Area"—"Lands all or any part of which abut" on a Street—London County Council (Improvements) Act, 1897 (60 *&* 61 *Vict. c. ccxlii.*), *s.* 42, *sub-s.* 1 (*c*).

By the London County Council (Improvements) Act, 1897, the London County Council were empowered (inter alia) to widen Tottenham Court Road, and to place an "improvement charge" on property included within an "improvement area," which was for this purpose defined, by s. 42, sub-s. 1 (*c*), as meaning "the lands all or any part of which front or abut upon the west side of Tottenham Court Road between Oxford Street and Hanway Street."

A music hall which had a frontage on Oxford Street, where the principal entrance was, had also an entrance from Tottenham Court Road to the pit and gallery, the proprietors of the hall having acquired a leasehold interest in a house in Tottenham Court Road for the purpose of making that entrance. In order to make it they removed the lower portion of a party-wall which separated the house from the hall, but they entered into a covenant to replace the wall at the end of the lease. They were owners in fee of part of the land on which the hall stood, and were leaseholders of the remainder:—

Held, that, as the whole of the property, including the entrance to the pit and gallery, was occupied for one purpose, it could not be said that only the house in Tottenham Court Road abutted on that road, and that consequently the power of the London County Council to place an improvement charge on the music hall was not limited to the house in Tottenham Court Road.

Motion on behalf of the plaintiffs asking that the defendants, the London County Council, their servants and agents, and also James Green, a co-defendant, might be restrained from proceeding further in the making of a valuation under s. 42 of the London County Council (Improvements) Act, 1897 (60 & 61 Vict. c. ccxlii.), of any lands, messuages, tenements, or hereditaments in which the plaintiffs were interested as owners, lessees, or occupiers, other than the messuage known as No. 2, Tottenham Court Road.

By the writ in the action the plaintiffs claimed a declaration that none of the lands, messuages, or tenements in which the plaintiffs were interested as owners, lessees, or occupiers, other than the messuage known as No. 2, Tottenham Court Road, were within the "improvement area" as defined by s. 42, sub-s. 1 (*c*), of the above-mentioned Act.

The Act empowered the council to make various street improvements in the administrative county of London, one of which was the widening of Tottenham Court Road at the end thereof which adjoined Oxford Street. Oxford Street ran from east to west; Tottenham Court Road ran from the east end of Oxford Street in a northerly direction. At the south end of Tottenham Court Road and on the west side of it stood a row of houses at the back of which was a court or alley called Bozier's Court. The houses on the west side of Bozier's Court were in the same line as the houses farther to the north on the west side of Tottenham Court Road. The Act (by s. 4) empowered the council to take down the houses on the east side of Bozier's Court, and to widen Tottenham Court Road by throwing the site of those houses into it.

By s. 42 (in Part III. of the Act), "Whereas the improvements will or may substantially and permanently increase in value lands in the neighbourhood of the improvements which will not be acquired for the purpose thereof, and it is reasonable that provision should be made under which in respect or in consideration of such increased value a charge should be placed on such lands—

"Therefore the following provisions shall have effect, viz.—

"(1.) In and for the purposes of this part of the Act, the expression 'the improvement area' means (inter alia)—

"(*c*.) In the case of the Tottenham Court Road widening the lands all or any part of which front or abut upon the west side of Tottenham Court Road and Bozier's Court between Oxford Street and Hanway Street.

"'Lands' shall extend to messuages, lands, tenements, and hereditaments. . . . .

"(2.) All lands within the improvement area, but which shall not be purchased and taken by the council under the powers of this Act shall be liable to have an improvement charge placed on such lands or some of them (in accordance with the provisions hereinafter set forth) in respect or in consideration of any substantial and permanent increase in value which it is clearly shewn has been derived from the improvements by this Act authorized."

By (3.), within a specified time "the council shall make under their seal a specification of all the lands within the improvement area for such improvement upon which they propose to place a charge and which they desire to include in the assessment hereafter mentioned."

The council were to give notice "to each owner, lessee, or occupier of any such lands as the council include in such specification." "Thereupon any such owner, lessee, or occupier may apply to the Local Government Board to appoint some independent person to make a valuation of the several lands within the improvement area which the council have included in the specification." The person so appointed was, after hearing any persons interested and applying to be heard, to proceed to make a valuation of all such lands, called the "initial valuation." If within one month after the service of the notices no application should be made for the appointment of a person to make the initial valuation, the council were to make the application, and the valuation was to be made accordingly. The valuer was to separately value the interest of the owner of any such lands and the interest of every lessee of any such lands for a term having not less than twenty-one years unexpired at the date of the valuation.

"(4.) The council shall, not sooner than twelve months nor later than three years after the issue by them of their certificate of the completion of the improvement, cause to be framed an assessment describing the lands situate within the improvement area and comprised in the said valuation which the council allege ought to bear and pay the said improvement charge, and the council shall in such assessment state and specify—

"(*a.*) The names of the owners lessees and occupiers of the lands described in the said assessment respectively so far as they can be ascertained;

"(*b*.) The amounts by way of charge which the council allege ought to be charged upon such lands respectively:

"The assessment shall contain a statement of the amount which the council allege is the enhanced market value derived by the lands respectively from the improvement:

"The amount to be proposed in the assessment as the charge to be placed on any lands under the provisions of this section shall be equal to three per centum per annum upon one-half of the amount which the council allege is the enhanced market value derived by the said lands from the improvement, after making all fair and proper deductions for rates taxes assessments and impositions on the said lands according to such increased value."

Provisions were made for the service of notice of the assessment on the owners, lessees, and occupiers of the lands described therein; for the service of objections by them; and for the appointment of an arbitrator to determine the matter of all objections.

"(16.) If no objection as hereinbefore provided be made to the assessment the amount defined by the assessment or the amended assessment (and if an award be made as hereinbefore provided then the amount defined by the award) as the charge in respect of any lands shall be a charge and incumbrance thereon and the council shall cause the same to be registered as a land charge under the Land Charges Registration and Searches Act, 1888."

By (17.) "The improvement charge charged upon any lands shall be apportioned between the several parties having any estate or interest in such lands as they shall agree or as in the event of no agreement being made or so far as any such agreement shall not extend shall be determined by the arbitrator who may apportion the incidence of such charge as between the freehold and any other estate or interest in the lands during the period of any existing term of years for which the same is held at the date of the award."

The plaintiff company were the occupiers of the Oxford Music Hall, the principal frontage of which and the main entrance were on the north side of Oxford Street, a little to the west of

Tottenham Court Road, from which the hall was separated by some intervening houses. The land upon which the hall stood was as to part thereof owned by the plaintiffs in fee, and of the remainder they were tenants under leases for long terms. Up to 1892 the Oxford Music Hall was entirely separated from Tottenham Court Road (on the east) by intervening houses which fronted on Tottenham Court Road or Bozier's Court. In June, 1892, the plaintiffs became tenants of the house No. 2, Tottenham Court Road, which adjoined the hall on the east, under a lease for a term of eighty years from June 24, 1892. The lease contained a covenant that the lessee should on or before the expiration or sooner determination of the term make such alterations and restorations to the messuage and buildings to be erected on the land thereby demised as were shewn on certain plans marked B, and so that the same messuage and buildings might be conveniently used as a shop and dwelling-house. The plaintiffs, when they obtained this lease, made a passage through the ground-floor of the demised premises, so as to form an entrance to the pit and gallery of the hall. For this purpose they removed the party-wall which separated the ground-floor of the premises from the hall, but the party-wall which separated the first and upper floors of the premises from the hall was left untouched. Under the above-mentioned covenant the plaintiffs were bound to reinstate the party-wall at the end of their term. The plaintiffs had also acquired, by means of an archway under another house further to the north in Tottenham Court Road, a passage which formed an exit from the hall into that road.

On December 31, 1897, the council served on the plaintiffs a notice under s. 42 of the Act. The notice was headed "Tottenham Court Road Widening," and it stated that the council had made under their common seal "a specification of all the lands in the above-mentioned improvement upon which they propose to place an improvement charge," and "that the lands included in the said specification in which you are believed to be interested as owner or reputed owner, lessee or reputed lessee, or as occupier, are described in the schedule hereto annexed." The schedule described the situation of the

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THE OXFORD, LIMITED v. LONDON COUNTY COUNCIL.

property as "14 to 18, Oxford Street, Tottenham Court Road, and Bozier's Court," and gave the description of the property as "music hall, buffet, entrances, exits, and yard."

The plaintiffs objected that under the provisions of the Act they were not liable to an improvement charge, except in respect of the premises No. 2, Tottenham Court Road, and that no other part of their property fronted or abutted on Tottenham Court Road. The plaintiffs did not apply to the Local Government Board for the appointment of a valuer, but the application was made by the council, and the defendant James Green was appointed. The plaintiffs then commenced this action on June 30.

Hon. E. C. Macnaghten, Q.C., and *Lord Robert Cecil*, for the plaintiffs. It has been suggested that the Court has no jurisdiction to interfere, but it is submitted that there is jurisdiction. If the valuation is allowed to proceed, the plaintiffs will have no opportunity of raising the question whether the "improvement charge" can be placed on the whole of their property: *London and Blackwall Ry. Co.* v. *Cross* (1); *Farrar* v. *Cooper.* (2)

[*Vernon Smith, Q.C.*, for the defendants, having regard to the provisions of this Act, admitted that the Court had jurisdiction.]

The sole question then is, Does the Oxford Music Hall "front or abut" on Tottenham Court Road? According to the ordinary use of language, it fronts and abuts on Oxford Street, though, no doubt, it is possible that a house should front and abut upon two streets. The hall certainly does not "front" on Tottenham Court Road. A music hall is brought within s. 42, sub-s. 1 (*c*), by means of the definition of "lands" as extending to "messuages and tenements." Consequently, in order that a "tenement" may be within the "improvement area," it must be a "tenement all or any part of which fronts or abuts upon the west side of Tottenham Court Road." The only tenement forming part of the music hall which comes within these words is No. 2, Tottenham Court Road.

Vernon Smith, Q.C., and *Methold*, for the London County

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(1) (1886) 31 Ch. D. 354.

(2) (1890) 44 Ch. D. 323.

Council. The word "lands" extends to "tenements," but is not restricted to that. The words of sub-s. 1 (*c*) are "all or *any part* of which abut." The plaintiffs practically admit that, if the principal entrance to the hall had been in Tottenham Court Road, the whole of the hall would have abutted on that road. What difference can it make that the entrance from that road is only a secondary entrance? Under s. 92 of the Lands Clauses Consolidation Act, 1845, the council, if they desired to take compulsorily a part of the music hall, might be required by the owners to take the whole. The council will of course have to shew that the property has been improved in value by the widening of Tottenham Court Road, and it will be open to the plaintiffs to shew that there has been no improvement in value. If there is an improvement, it cannot be that the improvement affects only the eastern entrance. The ownership of the different parts of the hall has no bearing on the present question. A house may be built on land belonging to different owners. The question is simply whether "the whole or any part of" the hall abuts on Tottenham Court Road. The music hall must be taken as a whole, and a part of it clearly does so abut. It is all one establishment, and is used for one purpose. Why should it be divided?

Hon. E. C. Macnaghten, Q.C., in reply. The present question is, whether the hall is within the improvement area—not whether it will be benefited by the improvement. Even if the entrance from Tottenham Court Road were the only entrance to the hall, it could not be properly said that the hall abutted on that road, because it abutted upon a passage which formed the only access to it.

NORTH J. In my opinion, the plaintiffs' motion must fail. The fallacy of the argument on their behalf lies in this, that it treats the various properties which together compose or make up what is called the Oxford Music Hall as if each of them was to be taken separately, and the fact that they are used as a whole was to be disregarded.

I observe that the notice which has been served by the London County Council on the plaintiffs is on a printed common form, filled up in the usual way. The first column refers to the number on a plan; the second column relates to the "situation of property," and the plaintiffs' property is there described as "14 to 18, Oxford Street, Tottenham Court Road, and Bozier's Court." The third column is headed "Description of Property," and the description given is, "Music Hall, buffet, entrances, exits, and yard," and there is added in a parenthesis "The Oxford Music Hall." The next column is headed, "Owner or reputed owner," and under that the name of the plaintiff company is given. In the next column, headed "Lessee or reputed lessee," they again give "the Oxford limited," and that company is also entered as "occupier." I do not say that the plaintiffs are bound by the description which the defendants choose to insert in their notice; but I refer to it, not because the plaintiffs are bound by it, but because it seems to me to be an accurate description of the property referred to: a fair description of the property taken as a whole. I do not see how it can be justly said that the property does not include more than the premises formerly known as No. 2, Tottenham Court Road and marked A on the plan. How far it goes I do not now decide; but in my opinion the property A is held with other property belonging to the plaintiffs making up and used as the Oxford Music Hall. The property A is in fact one of the entrances by which the public gain access to the hall. There is another entrance, or two entrances very near together, in Oxford Street; but, looking at the plan, which has been treated as correct, the "gallery entrance" and "pit entrance" are both through the property marked A on the plan.

Now, this being the description of the property, what does the Act say? [His Lordship referred to the introductory part of s. 42 and to sub-s. 1, as above set forth, and continued:—]

Are, then, the proprietors of the Oxford Music Hall the holders of "messuages, lands, tenements, or hereditaments abutting upon the west side of Tottenham Court Road or Bozier's Court"? I think they are. Beyond all question, they are as regards the house A itself. The ground-floor of that house is merely used as part of, and as the means of access to, the buildings behind it; it is used with them; and, in my opinion, it, with the buildings behind it, is used as one holding by the plaintiff company. It is impossible, therefore, for me to say that that part only of the lands held by the plaintiff company as a whole is included in the improvement area. On these grounds I must refuse the motion.

Solicitors: *Linklater, Addison & Co.; W. A. Blaxland.*

W. L. C.

NORTH J.
1898
July 21.

In re ALLEN.
BASSETT *v.* ALLEN.

[1898 A. 115.]

Statute of Limitations—Money charged on Land—Acknowledgment—Part Payment—Payment of Interest—Presumption of Payment—Devisee also Tenant for Life of Money charged—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

A testator, by his will dated January 11, 1845, devised his real estate and bequeathed his personal estate to trustees, upon trust for sale and to hold the proceeds of sale upon trust to pay his debts, and to hold the residue on trust to pay the income to his wife for her life, with remainder in trust for his children living at her death, or the issue of those then dead leaving issue then living. By a codicil, dated January 30, 1855, the testator revoked the devise of real estate contained in his will so far as regarded certain specified closes of land, and he devised those closes to his wife for her life, with remainder to his two sons in equal shares as tenants in common in fee. The whole of the real estate was subject to a charge of 3000*l.* created by a predecessor of the testator. In 1865 the trustees sold the greater part of the real estate (other than that specifically devised by the codicil), and out of the proceeds paid the 3000*l.*, and some of the testator's own debts. The widow died in 1895. After the sale until her death she received the income of the residue of the proceeds of sale, and also the rents of the unsold land, including those of the specifically devised land. She never gave to the trustees any acknowledgment of the liability of the specifically devised land to bear a proportionate part of the 3000*l.*, or paid to them any part of the 3000*l.* or any interest thereon:—

Held, that *In re England*, [1895] 2 Ch. 820, applied, and that, the widow being under no legal obligation to pay any part of the 3000*l.* or any interest thereon, the right of the persons interested in the real estate (other than that specifically devised) to compel contribution out of the specifically devised estate to the payment of the 3000*l.* was barred by s. 8 of the Real Property Limitation Act, 1874.

SUMMONS by the trustees of the will of John Allen, deceased, asking for the determination by the Court (1.) whether, upon the true construction of the will and codicil of the testator, the real estate devised by the codicil was liable to contribute, with the real estate comprised in the residuary devise contained in the will, to the payment of the incumbrances which at the time of the testator's death affected the real estate comprised in both the will and codicil; (2.) whether the right, if any, of the residuary devisees to require such a contribution to be made was barred by the Statute of Limitations or otherwise.

James Martin, by his will, dated February 16, 1839, devised all his real estate to his wife during her life or widowhood, with remainder to trustees for a term of 500 years, on trust after the death or second marriage of his wife to raise by mortgage or sale a sum of 3000*l.*, with remainder to John Allen in fee. The testator died in 1843; his wife died in 1864. She did not marry again.

John Allen by his will, dated January 11, 1845, devised all his real estate and bequeathed the residue of his personal estate to trustees, upon trust for sale and to hold the proceeds of sale, after payment thereout of his debts, funeral and testamentary expenses and legacies, on trust to pay the income thereof to the testator's wife, Martha Allen, for her life, with remainder in trust for such of his child or children as should be living at the decease of his wife and for the issue of such of them as should be then dead leaving issue then living, in equal shares if more than one, with remainders over.

By a codicil, dated January 30, 1855, the testator revoked the devise of his real estate contained in his will so far only as regarded some specified houses and closes of land, and he devised those houses and closes of land unto and to the use of his wife Martha Allen during her life, with remainder to the use of his two sons, John Perkins Allen and Thomas Perkins Allen, in equal shares as tenants in common in fee, and in case either of them should die under twenty-one then as to his share to the use of the other son in fee, and in all other respects the testator ratified and confirmed his will.

The testator died on February 13, 1855. He had no real estate but that which was devised to him by the will of James Martin. Martha Allen died on May 21, 1895.

John Allen left six children him surviving, namely, the two sons named in his codicil, and four daughters.

John Perkins Allen died on November 22, 1881. By his will, dated August 28, 1881, he devised and bequeathed all his property to trustees, with power of sale, and to hold the proceeds on trust for his wife Mary Ann Allen during her widowhood, with remainder in trust for all his children in equal shares.

Hannah Jemima Perkins Astill, one of the four daughters, died on October 21, 1889, leaving issue. The other son and the other three daughters survived Martha Allen, the widow of John Allen.

The defendants to this summons were Mary Ann Allen; the three surviving daughters of John Allen; and Kate Deborah Allen, a daughter of John Perkins Allen.

In the year 1865 the plaintiffs, as trustees of the will of John Allen, sold for 7860*l.* the greater part of his real estate, other than that specifically devised by his codicil, and out of the proceeds of sale they paid the 3000*l.* charged upon the real estate, and also some mortgage debts charged upon the real estate by John Allen. In 1894 a further part of the real estate (other than that devised by the codicil) was sold by the plaintiffs for 800*l.* After the death of Martha Allen the rest of the real estate (other than that devised by the codicil) was sold for 1100*l.* And in January, 1898, the real estate specifically devised by the codicil was sold for 600*l.*

From 1865 until her death Martha Allen received the rents of the unsold real estate (including that specifically devised) and the income of the residue of the proceeds of sale.

E. P. Hewitt, for the plaintiffs.

Ingpen, for Mary Ann Allen.

Vernon Smith, Q.C., and *Alfred Smith*, for the three surviving daughters of John Allen.

St. John Clerke, for Kate Deborah Allen.

NORTH J. held that the 3000*l.* charge created by James Martin's will ought to have been borne rateably by the residuary real estate and the specifically devised real estate, but that by virtue of the direction contained in the will of John Allen his own debts (including mortgage debts) must be borne by the residuary real estate.

Ingpen, for Mary Ann Allen. The right to compel contribution by the specifically devised real estate to the payment of the 3000*l.* is now barred by the Statute of Limitations. Martha Allen, who was in receipt of the rents of the specifically devised estate during her life for much longer than the statutory period of limitation, never paid any part of the capital or any interest, or gave any acknowledgment, to the persons interested in the residuary real estate. The fact that she was tenant for life of both estates can make no difference here.

Vernon Smith, Q.C., and *Alfred Smith*, for the three surviving daughters. The statute did not begin to run until the death of Martha Allen, the tenant for life. When the trustees sold the residuary real estate, and paid the 3000*l.* out of the proceeds, it was their duty to recover a proportionate part from the specifically devised estate. If the widow had paid interest on that proportionate part to the trustees, they must have paid it back to her as tenant for life of the residue, so that she would really have been paying the interest to herself. The rights of the parties could not be adjusted until her death in 1895, and the statute did not begin to run till then. If the strict legal course had been followed the trustees would have brought an action against Martha Allen to raise the proper proportion of the 3000*l.* by means of a mortgage of the specifically devised estate. She would then have paid the interest on the mortgage debt to the trustees, and they would have paid it back to her. Under these circumstances there was a constructive or presumptive payment of interest by her to the trustees, and that is enough to prevent the statute from running: *Topham* v. *Booth* (1); *Burrell* v. *Earl of Egremont.* (2) The authority of *Topham* v. *Booth* (1) was recognised in *In re England.* (3) On the death of Martha Allen the two estates for the first time went in different directions. The persons interested in the residuary estate could take no proceedings during her life.

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(1) (1887) 35 Ch. D. 607.
(2) (1844) 7 Beav. 205.
(3) [1895] 2 Ch. 820.

[NORTH J. The trustees might have done so.]

Ingpen, in reply. The persons interested in the residue have to prove that they come within the saving clause in s. 8 of the Real Property Limitation Act, 1874. In *In re England* (1) the debt in question arose upon a covenant of the testator in respect of which his son, the devisee in fee of land upon which the debt was charged, was not liable, and it was held that there was no presumption of payment of interest by him. That case governs the present case. The testator's widow was under no legal liability to pay any part of the 3000*l.* or any interest thereon, and therefore a fictitious payment cannot be presumed. No intention to keep the charge alive as against the specifically devised estate is shewn. The trustees might have taken proceedings in 1865, and the remedy is now barred by s. 8.

NORTH J. In my opinion this case is governed by *In re England.* (1) The whole of the testator John Allen's real estate—residuary and specific—was devised by him subject to the paramount charge of 3000*l.* created by James Martin. That charge was paid off in 1865 out of the proceeds of the sale of a part of the residuary real estate, and was thus extinguished. Nothing was done at that time or afterwards to keep the charge alive, or to treat it as subsisting. Now, after the death of the widow, who was tenant for life of all the real estate, it is said that the charge ought to have been borne rateably by the residuary real estate and the specifically devised estate. What, then, has there been to prevent the Statute of Limitations from running? There has been no acknowledgment in writing, and no payment of capital or interest by the tenant for life. It is suggested that there has been something in the nature of a constructive payment of interest by her. In *Topham* v. *Booth* (2) and in *Burrell* v. *Earl of Egremont* (3) such a payment was proved, but I am unable to see any proof of it here. The widow was under no legal obligation to pay any part of

(1) [1895] 2 Ch. 820.

(2) 35 Ch. D. 607.

(3) 7 Beav. 205.

NORTH J.
1898
ALLEN, *In re*
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the 3000*l.*, or any interest thereon. It is true that the specifically devised estate would have been subject to the charge, if it had not been paid off. But it has been paid off, and it is gone. In my opinion the statute is a bar to the right of the residuary devisees to require contribution from the specific devisees under the codicil, and I must answer the second question accordingly.

Solicitors: *Preston, Stow & Preston; J. T. Rossiter.*

W. L. C.

NORTH J.
1898
July 28;
Aug. 4, 5.

In re GUNDRY.
MILLS *v.* MILLS.

[1898 G. 323.]

Settlement—Evidence—After-acquired Property—Revocation.

Two ante-nuptial settlements were executed, each contained a covenant to settle after-acquired property of the intended wife, but upon different trusts. In the absence of evidence of reasons for making the second settlement, the Court, without deciding whether the first settlement in point of time could have been superseded as to after-acquired property, refused to hold that the first settlement was superseded by the second.

THIS was an originating summons taken out by Anna Ellen Mills, the wife of William Gundry Mills, having reference to two settlements made in contemplation of the marriage of William Gundry Mills and the plaintiff, which was solemnized on May 10, 1879.

The first settlement was dated March 15, 1879, and made between William Gundry, the father of the plaintiff, of the first part, William Gundry Mills of the second part, the plaintiff of the third part, and Henry White and Arthur Percy Davis, trustees, of the fourth part. The proceeds of sale of certain real estate comprised in an indenture of even date were settled on trust to pay the income to the plaintiff during her life for her separate use, and after her death for her issue as she should appoint, and in default of appointment for her children equally, and in default of such children for her father

William Gundry for life, and after his death for the benefit of his brothers and sisters and their children. The settlement contained a covenant to settle on the same trusts any property which the plaintiff at the time of the intended marriage, or she with her intended husband in her right, should during coverture become entitled to exceeding 200*l*. in value acquired at one time.

The second settlement was dated May 7, 1879, and made between the same parties of the first, second, and third parts, and Thomas Gundry and Thomas Mills as trustees of the fourth part. Certain furniture and property of small value were settled in trust for the plaintiff for life for her separate use, and after her death for her intended husband for life, and after the death of the survivor of the intended husband and wife for such persons as the plaintiff should appoint, with remainders over in default of appointment. This settlement contained a covenant to settle all property (except jewels and trinkets and property not exceeding 50*l*. in value acquired at one time) to which the plaintiff at the time of the intended marriage should be entitled, or she or her intended husband in her right should at any time during coverture become entitled upon the trusts declared respecting the furniture and other property comprised in the settlement.

Thomas Mills and Thomas Gundry were the present trustees of both settlements. The settlements had been prepared by different solicitors: the first was executed in London, the second at Fowey. There was no reference in the second settlement to the first. There was no evidence before the Court as to the reasons why, or the circumstances under which, the second settlement was made.

William Gundry died on September 20, 1897, having made a will dated May 18, 1893, by which he gave his residuary estate to his daughter, the plaintiff. Thomas Mills and Thomas Gundry, two of the persons named by him as executors, proved his will, the other persons named having renounced probate. The value of the testator's residuary estate exceeded 100,000*l*.

The defendants to the summons were Thomas Mills and Thomas Gundry (executors of the will of William Gundry and the present trustees of both settlements), William Gundry

Mills, the plaintiff's husband, and the eight living children of the marriage, all infants.

The object of the summons was to determine on the trusts of which of the settlements the residuary estate of William Gundry ought to be held.

Henry Terrell, Q.C., and *Broke Freeman*, for the plaintiff. A covenant to settle after-acquired property is an inchoate settlement, and in a similar position to marriage articles, which can be altered before marriage: *Legg* v. *Goldwire* (1); Fearne on Contingent Remainders, 10th ed. vol. i. p. 107.

The execution of the second settlement, which so far as the trusts of after-acquired property are concerned is inconsistent with the first settlement, operated as revocation of the trusts of the after-acquired property, and substitution of the new trusts declared by the second settlement.

Ingle Joyce, for the defendant William Gundry Mills.

Waggett, for the trustees.

Vernon Smith, Q.C., and *Buckmaster*, for the children of the marriage. An executed settlement in consideration of a marriage which afterwards takes place cannot be altered before marriage, either with respect to existing property or after-acquired property. As far as the after-acquired property was concerned, everything that could be done had been done: *Page* v. *Horne*. (2) The case is different from a case of mere articles: *Bond* v. *Walford*. (3)

[NORTH J. This is different from a case like *Thomas* v. *Brennan* (4), where the contemplated marriage did not take place.]

If a settlement of after-acquired property were on the footing of marriage articles, an intention to revoke the first settlement would have to be shewn in order to displace it. No such intention is shewn to have existed; the covenant in the second settlement would catch property not within the earlier covenant, so that they were not altogether inconsistent.

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(1) (1736) Cas. t. Tal. 20.

(2) (1846) 9 Beav. 570; (1848) 11 Beav. 227.

(3) (1886) 32 Ch. D. 238.

(4) (1846) 15 L. J. (Ch.) 420.

The second settlement was, apart from the covenant to settle after-acquired property, of small importance; the parties had probably not before their mind the fact that the first settlement contained the covenant said to be inconsistent with what they were doing; the solicitor employed may not have known of the existence of the first settlement. If there had been any intention to alter the first settlement, there would have been some recital to that effect.

[NORTH J. Mr. Terrell, I do not see how I can decide in your favour on the present evidence, even if I hold that the parties had power to alter the trusts of after-acquired property before marriage. I will either allow the matter to stand over for further evidence, or decide it finally after hearing you in reply.]

Henry Terrell, Q.C. I will elect to have the case decided on the existing evidence. The only case cited against me relates to a settlement where the property was actually vested in trustees. Before the marriage the settlement, so far as the trustees and children were concerned, was voluntary. Such a settlement cannot be enforced by the volunteer: *Tweddle* v. *Atkinson* (1); *Price* v. *Easton* (2); *In re Anstis.* (3)

NORTH J. (after stating facts). The question is, what is the effect of what has taken place? Does the mere fact that the second deed was made after the first make it paramount to and supersede the first, and make it the governing deed? What was done in each case was done by deed. These instruments were not mere contracts with a view to something in the future being done; but these purported to be two complete, absolute deeds—completed out and out, excepting that so far as relates to the after-acquired property something might have to be done—perhaps by a conveyance of real property, perhaps by handing over chattels, perhaps by transfer of personal property in some other way.

But it is said that the mere fact that the second deed was executed after the first, both being before marriage, supersedes the first. Whether it could or could not under any circumstances do so, I decline to say that it does upon the evidence before me. In fact there is no evidence whatever addressed to the question. I have no evidence of the circumstances under which the two documents were made. I have not the slightest evidence whatever of any intention of the parties to the second to supersede the first, except such as is to be got from the mere fact that there are two documents, executed at different times; and I assume that they were executed on the dates which they bear, and, therefore, that their order of first and second is sufficiently proved. I know if the second deed prevails over the first the wife will have power to appoint 100,000*l.* away from her children, which she has not now.

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(1) (1861) 1 B. & S. 393.
(2) (1833) 4 B. & Ad. 433.
(3) (1886) 31 Ch. D. 596.

In that state of things the parties concerned give no evidence whatever of any intention to change their views. What the circumstances under which the deeds were executed were I do not know. The deeds were not prepared by the same solicitor, or executed in the same place: the first was executed in London, the second was executed at Fowey. What the history of the matter is I do not know: whether the persons at Fowey had called to their attention, or had personal knowledge of, the existence of the covenant to settle after-acquired property contained in the solemn deed executed previously by them. Under these circumstances I decline as matter of law to say that the mere fact that one deed is dated after the other makes that deed a revocation of, or a supersession of, the first as far as the subject-matter of the two correspond.

There is this further to be said. In the first deed, besides a covenant to settle after-acquired property, there was considerable property settled by the father of the intended wife. The second deed seems, apart from after-acquired property, to be a settlement of what is comparatively very unimportant—some furniture. There is no reference whatever in the second deed to the first, although that is not absolutely essential: but it is very strange, if it was intended to supersede the trusts of the first deed by the second, that there should be no reference to the first deed in the second.

Under these circumstances I decline to say that there is any evidence here on which I can act to enable me to say that the second is paramount to the first—that is to say, is to supersede the first.

I do not profess to say what conclusion ought to be arrived at as to the legal effect of the second deed upon the first if no evidence was obtainable, as if the question had arisen a hundred years hence, when all the parties were dead, and all the documents relating to the matter were lost except the deeds themselves: but in this case many parties living at the date of both settlements are still alive, and do not condescend to give me any information.

The cases cited shew this —that the parties may if they please, if they intend to do so, vary marriage articles by other articles made before marriage. I am not at all satisfied that that principle applies to a covenant to settle after-acquired property, but assume it does for present purposes. I refuse, in the absence of any evidence whatever of that sort, which interested persons may know of, but do not choose to tell me—I refuse to say there is any evidence whatever, on which I can act, of intention to supersede the first deed by the second deed.

As far as consideration goes, if one covenant is voluntary the other is equally voluntary, as far as it is made before marriage. When the marriage took place it made the children not volunteers but purchasers: the parties are in exactly the same position with regard to each covenant. The marriage which was solemnized ultimately was agreed upon before the first settlement was made; the agreement undoubtedly continued to the time the first deed was executed, continued to the time the second was executed, and still continued down to the time the marriage actually took place. There was one engagement from first to last. Under these circumstances I decline to hold that the wife is entitled to claim under the second settlement, notwithstanding the trusts of the first, as far as they are inconsistent with the second.

Solicitors: *Carthew & Wheeler, for Graham & Graham, St. Austell.*

D. P.

Followed. *Re* RUSHBROOK'S WILL TRUSTS. [1948] 1 All E.R. 932.

Followed. *Re* RUSHBROOK'S WILL TRUSTS. [1948] **Ch. 421**

NORTH J.
1898
Aug. 11.

In re DAY.
SPRAKE *v.* DAY.

[1893 D. 2050.]

Building Contract—Non-completion before Death of Landowner—Devise of the Land—Right of Devisee to have the Contract completed at Cost of Landowner's Personal Estate.

A testator having in his lifetime entered into a contract for the erection of buildings on land belonging to him:—

Held, on the authority of *Cooper* v. *Jarman*, (1866) L. R. 3 Eq. 98, that, the buildings not having been completed before the testator's death, the devisee of the land was entitled to have them completed at the cost of the testator's personal estate.

The testator had also entered into a contract for the erection of buildings upon land belonging to the devisee by an independent title, and these buildings were not completed before the testator's death:—

Held, that *Cooper* v. *Jarman* did not apply, and that, it not being shewn that the devisee had given valuable consideration for the contract, she was not entitled to have the buildings completed at the cost of the personal estate.

THIS action was brought for the administration of the real and personal estate of Joseph Addison Day, who died on November 9, 1893.

An administration judgment was given on July 11, 1896.

The present application was made by a summons, asking that, in addition to the accounts and inquiries directed by the judgment, certain other inquiries might be directed.

The testator, by his will, dated June 2, 1893, appointed the plaintiffs and the defendant H. J. Sprake, to be executors and trustees thereof. And he devised his dwelling-house known as Weston Manor House, together with the stables, &c., thereto belonging, and certain closes of land adjoining, to the use of Elizabeth Louisa Sprake-Day during her life, and after her decease to the use of her daughter Alice Maud Day (the other defendant) during her life, and after the decease of the survivor of them the testator directed that the said premises should fall into and form part of his residuary estate.

In May, 1893, the testator entered into a contract with some builders for the erection of some cottages upon a part of the property thus devised to Mrs. Sprake-Day and her daughter. The testator had also entered into another contract with the builders for the erection of a house on some land situate at a place called Misterton which belonged to Mrs. Sprake-Day, it having been conveyed to her absolutely at his instance during his lifetime. At the time of the testator's death neither of these contracts had been completed, and after his death the builders were not allowed by the plaintiffs to finish the work. Mrs. Sprake-Day and her daughter claimed to be entitled to have both the contracts carried out at the cost of the testator's personal estate, and they took out this summons, asking (inter alia) that the following additional inquiry might be directed: "Whether the testator at the time of his death had entered into any and what building contracts or contract still remaining uncompleted, and whether the estate of the testator is under any liability in respect thereof, and what sum or sums of money would have to be provided in order to have such contracts or contract completed."

H. Terrell, Q.C., and *Mark Romer*, for the summons. Mrs. Sprake-Day is entitled to have both the contracts carried out at the cost of the testator's personal estate. Her right is not affected by any arrangement which the executors may have made with the builder. As to the land devised to her, the point is concluded by authority: *Holt* v. *Holt* (1); *Cooper* v. *Jarman.* (2) In the latter case it was held that the heir-at-law of an intestate was entitled to have a contract which the intestate had entered into for the erection of a house upon land belonging to him completed at the cost of the intestate's personal estate. The same principle applies to the specific devisee of a testator. It cannot be right that it should be left to the option of the executor whether the specific devisee or the residuary legatee shall be benefited, according as the contract is or is not carried out.

The principle of *Cooper* v. *Jarman* (2) extends to a contract

(1) (1694) 2 Vern. 322.

(2) L. R. 3 Eq. 98.

by a testator for the erection of buildings on land belonging to another person.

Hon. E. C. Macnaghten, Q.C., and *T. H. Carson*, for the executors. As to the Misterton property, *Cooper* v. *Jarman* (1) does not apply. The applicants have no right to have the contract completed at the cost of the testator's estate. He himself might have changed his mind. If he had pulled down an old house on the property in order that a better one might be built in its place, possibly he might have been bound to go on with the contract. The owner of the land would in such a case have given something in the nature of valuable consideration. But there is no evidence of anything of that sort here. Mrs. Sprake-Day was a mere volunteer, and as regards her the testator could have stopped the building whenever he pleased. The land was her property, and there is no reference in the will to the building contract. The specific performance of a building contract cannot be enforced; the builder's only remedy is by way of damages for non-completion. The contract was not for the benefit of the testator's estate.

As to the contract for building on the land devised to Mrs. Sprake-Day, *Cooper* v. *Jarman* (1) is a case per se, and it is distinguishable from the present case. There the administrator had in fact carried out the contract after the death of the intestate, and he was allowed the cost of so doing out of the intestate's personal estate.

[NORTH J. But on the ground that he was bound as between himself and the heir to carry out the contract.]

The ground of the decision was that the work had been done.

[NORTH J. I cannot dissent from *Cooper* v. *Jarman* (1), and I think it covers the present case as regards the devised land.]

It does not cover the Misterton property.

Mark Romer, in reply. The principle of *Cooper* v. *Jarman* (1) applies to land which was not the testator's. There was nothing in that case to shew that the intestate desired to benefit his heir-at-law rather than his next of kin. The question was whether the next of kin were entitled to require the administrator not to carry out the contract, because it would be more beneficial to them that it should not be carried out. The answer to that question could not depend upon whether the land belonged to the intestate or to a third person.

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(1) L. R. 3 Eq. 98.

North J. As regards the property which was devised by the testator for the benefit of Mrs. Sprake-Day and her daughter, and which was the subject of a contract for building existing at the time of his death, I think a case is made for an inquiry, because it seems to me that *Cooper* v. *Jarman* (1) applies. It is said that that case stands by itself; but although, so far as I know, there has been no other case which supports it, on the other hand there is none against it, and it lays down an intelligible principle. It has been unreversed for a great many years, and though no doubt the point is one which does not often arise, still there the case stands, and I must follow it. But I do not think it applies to the Misterton property which was not given by the testator's will. That property had at some time before his death been conveyed direct to Mrs. Sprake-Day at his instance. Then the testator entered into a contract for the building of four cottages upon this land. This contract has not been completed, but the person entitled to the benefit of it has carried in a claim against the testator's estate, and it appears from the chief clerk's note that a certain sum has been allowed. I do not see that any claim has been made by Mrs. Sprake-Day in respect of this property. The property was conveyed to her out and out, and the testator entered into some contract with respect to it, but whether under such circumstances that she could have compelled him to carry out the contract I do not know. I can understand that there might be circumstances under which he would have been bound to carry out such a contract, by reason of some consideration moving from her to him to induce him to undertake the liability. But the evidence which has been adduced does not establish any liability of that kind, and I do not see how a person who for this purpose is a

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(1) L. R. 3 Eq. 98.

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DAY, *In re.*
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stranger—the owner of the property before the testator's death and not taking it under his will—can claim to have a contract entered into by the testator with a builder to erect houses upon it carried out. Under these circumstances I can only direct an inquiry whether the testator had entered into any and what building contracts or contract affecting the property devised to Mrs. Sprake-Day for her life, with remainders over, and whether any and which of such contracts were uncompleted at his death in respect of which his estate was under any and what liability, and whether any and what compensation should be paid by the testator's estate in respect thereof.

Solicitors: *Hartcup, Davis & Cobbold; Edmonds & Co.*

W. L. C.

CROYSDALE *v.* SUNBURY-ON-THAMES URBAN DISTRICT COUNCIL.

STIRLING J.
1898
June 30; July 1, 9.

[1897 C. 498.]

Local Government—Sewer—Vesting in Local Authority—Sewer made by Landowner "for his own profit"—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *ss.* 13 *sub-s.* 1, 15, 16, 17, 144—*Highway Act*, 1835 (5 & 6 *Will.* 4, c. 50), *ss.* 67, 68.

The word "profit" in s. 13, sub-s. 1, of the Public Health Act, 1875, is not to be restricted to a direct money payment. Accordingly, a sewer which is not made for ordinary drainage purposes, but to enable the land on which it is made to be occupied more profitably, or to avoid an expenditure which would otherwise have to be incurred in order that the occupation might be equally beneficial, is made for the "profit" of the owner within the meaning of the section, and does not vest in the local authority:—

So *held*, in the case of a line of pipes laid down by the owner of a field adjoining a highway from a ditch bordering the highway to a disused gravel pit in the field for the purpose of supplying water to the cattle fed in the field.

Minehead Local Board v. *Luttrell*, [1894] 2 Ch. 178, and *Ferrand* v. *Hallas Land and Building Co.*, [1893] 2 Q. B. 135, followed and applied.

Held, also, that as on the authority of *Croft* v. *Rickmansworth Highway Board*, (1888) 39 Ch. D. 272, the pit did not form part of the drainage system vested in the local authority, they had no power under s. 67 of the Highway Act, 1835, to discharge surface water from the road into the pit, and were not entitled to enter upon the field in order to keep open the existing drain, or to make any other for the same purpose.

ACTION.

The plaintiff was the owner of a house and grounds in Sunbury known as Hooke House, including a field situate on the west side of a road known as Green Street, and running nearly north and south. The field sloped downwards from Green Street, and then rose again. In the dip were two ponds, the larger of which was formerly a gravel-pit. At the side of Green Street nearest the field was at one time an open ditch, from which there ran down to the pond a line of pipes which discharged into the pond. The end of this line next the ditch was protected by a grating at a level of more than two feet below the surface of the road. The other end of the pipes

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projected into the pond to the extent of six inches or thereabouts.

In August, 1896, a portion of the ditch near the grating had become filled by an accumulation of rubbish which completely covered the grating, so that there was nothing at that point to indicate its existence or that of the line of pipes.

In December, 1896, the plaintiff, with a view to filling up the pond, removed the line of pipes so far as it existed on his own land.

Subsequently the defendants entered on the plaintiff's lands and cut a trench between the ditch and the pond for the purpose of running off the surface water from Green Street. The present action was thereupon brought, in which the plaintiff claimed :—

1. A declaration that the defendants were not entitled without the leave or licence of the plaintiff to drain the surface water from Green Street, or from any of the roads or streets in the parish of Sunbury-on-Thames, into the plaintiff's said pond and land, or to lay down or make on the plaintiff's said land, or use, any drain-pipe or trench for any such purpose.

2. An injunction to restrain the defendants, their servants and agents, from draining such surface water into the plaintiff's said pond and land, and from laying down or making on the plaintiff's said land, or using or permitting, any drain-pipe or trench to remain laid down, or made for any such purpose as aforesaid, and from trespassing on the plaintiff's said premises.

The defendants, who became the urban district authority of Sunbury on December 3, 1894, justified their acts under (1.) the powers conferred on them as the urban district authority by the Public Health Act, 1875 ; (2.) their powers as the highway authority under s. 144 of that Act and the Highway Act, 1835.

It was proved that the line of pipes was originally put in about 1858 or 1859 by the then tenant of the field for the purpose of obtaining a better supply of water in the pond for the use of the cattle and other stock feeding in the field.

The evidence also shewed that subsequently the surveyors of highways from time to time had caused the rubbish deposited on the grating at the ditch and of the pipes to be removed, but had never repaired or even cleaned the pipes themselves.

Butcher, Q.C., and *Austen-Cartmell*, for the plaintiff. First, it is said that the case comes within ss. 16 and 17 of the Public Health Act, 1875, which empower the local authority to carry any sewer (upon certain notice being given to the owner or occupier) into, through, or under any lands whatsoever within their district, and subject to certain restrictions to discharge such sewer into any stream, canal, pond, or lake within their district; and *Durrant* v. *Branksome Urban Council* (1) is relied upon. But that case does not apply, because we are not here, as there, dealing with the making of a new drain.

Secondly, it is said that s. 15 applies, under which the local authority must keep in repair all sewers belonging to them. We submit, however, that this is a sewer made by a person "for his own profit" within the first exception to s. 13, and consequently that it is not vested in the defendants: *Minehead Local Board* v. *Luttrell* (2); *Ferrand* v. *Hallas Land and Building Co.* (3); *Meader* v. *West Cowes Local Board.* (4)

Lastly, it is contended that ss. 67 and 68 of the Highway Act, 1835, apply. But s. 67 only authorizes the making and keeping open of ditches and drains in and through lands adjoining a highway, and does not authorize the discharge of the contents of any ditch or drain upon such lands, and, unless the pond can be treated as part of the defendants' drainage system, they are not entitled to discharge the surface water into it. That it does not form part of their drainage system is shewn by the decision in *Croft* v. *Rickmansworth Highway Board* (5), which covers this case.

Macmorran, Q.C., and *Elgood*, for the defendants. If we were asserting a right to go upon the plaintiff's land and open the pond, then *Croft* v. *Rickmansworth Highway Board* (5) would be in point.

(1) [1897] 2 Ch. 291.
(2) [1894] 2 Ch. 178.
(3) [1893] 2 Q. B. 135.
(4) [1892] 3 Ch. 18.
(5) 39 Ch. D. 272.

[Stirling J. Is the plaintiff entitled to fill it up?]

That point is not raised in this action. As to s. 13 of the Public Health Act, 1875, this is not a sewer made for "profit" within the exception.

Minehead Local Board v. *Luttrell* (1) is the only case in which a sewer has been held to come within the exception, though the point has often been raised.

In *Ferrand* v. *Hallas Land and Building Co.* (2) it was held that a sewer made by a landowner for the sole purpose of draining houses erected by him on his own land was not made by him "for his own profit." "Profit" imports pecuniary gain—i.e. money or money's worth—and does not mean merely benefit or advantage. It cannot be disputed that the defendants might, under the Highway Act, make a drain into the pond to-morrow. The existing drain is de facto a sewer such as the defendants are entitled to make, and the Court will not restrain them from keeping it open. [He also referred to *London and North Western Ry. Co.* v. *Runcorn Rural Council.* (3)]

Butcher, Q.C., in reply. The exception to s. 13 was intended (1.) for the protection of private rights, and (2.) to prevent the imposition of an undue burden upon local authorities under s. 15. It should receive a reasonable interpretation. This is just such a case as was contemplated by the framers of the exception. "Profit" cannot be limited to mere pecuniary gain or advantage. The defendants have no power under the Highway Act over this drain. This is even a stronger case than *Croft* v. *Rickmansworth Highway Board.* (4)

[Stirling J. Have the defendants not power to make a new drain into the pond?]

That point is not now raised. No surveyor has reported that it is necessary.

Cur. adv. vult.

July 9. Stirling J. The first question is whether the defendants can justify what they have done under the powers conferred by the Public Health Act, 1875. The sections relied on are ss. 13–17. It is in the first place contended that the pipes became vested in the defendants by virtue of s. 13. It is established by *Durrant* v. *Branksome Urban Council* (1) that the sewers to which the provisions of that Act apply include sewers for the removal of surface water as well as those for carrying off what is ordinarily termed sewage. That being so, the pipes constitute a sewer within the definition contained in s. 4; for they do not fall within the exception in that section of "drains vested in or under the control of any authority having the management of roads and not being a local authority" under the Act, the defendants being themselves the highway authority for the district. It is, however, contended for the plaintiff that they fall within the first exception in s. 13, namely, "sewers made by any person for his own profit." The meaning of this exception has been considered in several cases. In *Minehead Local Board* v. *Luttrell* (2) it was held that sewers constructed by a landowner for the use of persons by whom he was to be remunerated by a direct money payment for the use of them fall within the exception. The word "profit," however, is not, in my opinion, to be restricted to a direct money payment. This was laid down in *Ferrand* v. *Hallas Land and Building Co.* (3), both by Lopes L.J. (4) and A. L. Smith L.J. (5) When the object of making the sewer is not either for sanitary or ordinary drainage purposes, but to enable the land to be occupied more profitably or to avoid an expenditure which would otherwise have to be incurred in order that the occupation might be equally beneficial, it seems to me that the sewer is made for the profit of the occupier. In the present case the field was not adequately supplied with water for the use of the cattle fed in it; the tenant, in order to avoid the expense of bringing water from some other source of supply and to enable him to use the pond for feeding his cattle, made this line of pipes; and I think he did so for his own profit within the meaning of the section.

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(1) [1894] 2 Ch. 178.
(2) [1893] 2 Q. B. 135.
(3) [1898] 1 Ch. 561.
(4) 39 Ch. D. 272.

Sect. 16 was referred to, but, whatever may be done hereafter, the defendants have not as yet brought themselves within its terms. So far as the evidence goes, no report was obtained from a surveyor, nor any notice given to the owners or occupiers previously to the acts complained of, nor down to the present time.

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(1) [1897] 2 Ch. 291.

(2) [1894] 2 Ch. 178.

(3) [1893] 2 Q. B. 135.

(4) Ibid. 141–2.

(5) [1893] 2 Q. B. 144.

It is then to be considered whether the defendants derive any sanction for their acts from the Highway Act, 1835. The clauses relied on are ss. 67 and 68. The former authorizes the highway authorities to "make, scour, cleanse, and keep open all ditches, gutters, drains, or watercourses, and also to make and lay . . . . trunks, tunnels, flats, or bridges . . . . in and through any lands or grounds adjoining or lying near to any highway." That section, however widely it be construed, only authorizes the making and keeping open of ditches and drains in and through lands adjoining a highway, and does not authorize the discharge of the contents of any ditch or drain on such lands. Unless, then, the pond can be treated as part of the drainage system under the control of the authorities, these sections do not empower the defendants to discharge the surface water into the plaintiff's pond; and the case of *Croft* v. *Rickmansworth Highway Board* (1) shews that the pond cannot be so regarded. In my judgment, therefore, this defence also fails the defendants.

It was, lastly, contended that an injunction ought not to be granted because the defendants may hereafter put in force the powers conferred by s. 16 of the Public Health Act, 1875. At present, however, they do not shew that they are in a position so to do; down to this time they have been in the wrong; there ought, therefore, to be a declaration and an injunction in accordance with the claim; but the order will be without prejudice to the future exercise by the defendants of any statutory powers which may be vested in them.

Solicitors: *J. J. Freeman; Charles Jupp.*

G. A. S.

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(1) 39 Ch. D. 272.

PERRINS *v.* BELLAMY.

KEKEWICH J.

1898
July 20.

[1897 P. 987.]

Trustee—Breach of Trust—Relief of Trustees from Personal Liability under s. 3 *of Judicial Trustees Act,* 1896 (59 & 60 *Vict. c.* 35).

Where trustees, erroneously assuming that they had a power of sale, sold settled leaseholds and thereby diminished the income of the plaintiff, who, as tenant for life of a moiety, was entitled to rents and profits in specie, but the sale would have been a proper one if the trustees had in fact possessed a power of sale:—

Held, that as the trustees had acted honestly and reasonably, they were entitled under s. 3 of the Judicial Trustees Act, 1896, to be relieved from personal liability in respect of the breach of trust, and that an action by the plaintiff to make them personally liable for the diminution of her income must be dismissed.

The meaning and application of the section considered.

By an indenture of settlement dated October 23, 1879, and made between Elijah Barnett of the one part and Edward Wright Barnett, and Elijah Barnett and Charlotte his wife of the other part, Elijah Barnett, in consideration of the natural love and affection which he had towards his wife and his two daughters Eliza Barnett and the plaintiff Alice Mary Perrins (then Barnett), assigned to Edward Wright Barnett, Elijah Barnett, and Charlotte Barnett, their executors, administrators, and assigns (amongst other property) certain leasehold premises consisting of seventeen houses situated in Edgbaston, near Birmingham, for the respective residues then unexpired of the several terms of years under which the premises were then held, upon trust to pay the income to arise from the premises, or to allow the same to be received by Charlotte Barnett during her life, and after her decease upon trust to pay the annual income thereof to Eliza Barnett and the plaintiff Alice Mary Perrins for and during their several lives in equal shares, and subject thereto upon certain trusts under which in the event of Eliza Barnett dying without issue the children of the plaintiff Alice Mary Perrins, on their mother's death, would become entitled to the whole, and in any other event to a moiety of the leaseholds. It was thereby declared that the shares and interests thereby given to or in trust for any female were so given for her own sole and separate use and benefit without power of anticipation; and also that the trustees or trustee should lay out and invest a sum of 2000*l.* thereby settled and all other moneys coming to their, his, or her hands under the trusts in or upon certain specified securities comprising freehold ground-rents, but not comprising leaseholds, and on such securities only, with full power to vary and transpose such securities for other securities of a similar nature. The settlement contained no express provision enabling the trustees to sell the leaseholds or any of them.

By an indenture dated October 6, 1882, and made between the same persons as were parties to the settlement and in the same order, after reciting that Elijah Barnett was desirous that the trustees or trustee for the time being of the settlement should have power to sell and dispose of the leasehold messuages and premises thereby settled, it was agreed and declared that the trustees or trustee of the settlement should at their, his, or her absolute discretion have full power to sell and absolutely dispose of the leasehold messuages and premises.

Elijah Barnett died on February 10, 1888, and Edward Wright Barnett died on November 24, 1887.

By an indenture dated February 25, 1889, the defendants John Bellamy and Norris Tildasley Foster were appointed trustees of the settlement in the place of Elijah Barnett and Edward Wright Barnett deceased jointly with Charlotte Barnett, and the trust property, including the leasehold premises, was duly vested in them accordingly.

Charlotte Barnett died on February 26, 1895.

The plaintiff Alice Mary Perrins on September 9, 1890, married Frederick Howard Perrins, and there were two children of the marriage, namely, the infant plaintiffs Hilda May Perrins and Gladys Charlotte Perrins. Eliza Barnett was of full age and unmarried.

Shortly after the death of Charlotte Barnett, namely, on May 10, 1895, the defendants John Bellamy and Norris Tildasley Foster, purporting to act as trustees of the settlement, offered for sale by public auction in Birmingham in eleven lots the whole of the leasehold premises comprised in the settlement. Nine of the lots, which included thirteen of the leasehold houses, were purchased at the auction, and the purchases duly completed. The remaining two lots, comprising four houses, were also agreed to be purchased at the auction; but the respective purchasers thereof declined to complete on the ground that the defendants had no power to sell, and one of such purchasers took out a summons in the Chancery Division under the Vendor and Purchaser Act, 1874, to try the question whether the defendants had shewn a good title to sell the property. The summons was heard before Kekewich J. on November 18, 1895, when his lordship decided that the trustees of the settlement had no power to sell, and ordered the return of his deposit with interest to the purchaser, and that the defendants Bellamy and Foster should pay the costs of the application.

A proposition was subsequently made that the sale should be carried out by the tenants for life under the Settled Land Acts; but as the plaintiff Mrs. Perrins declined to concur, this proposition fell through, and the four houses remained unsold.

This action was brought by Alice Mary Perrins and Hilda May Perrins and Gladys Charlotte Perrins, infants, by Frederick Howard Perrins, their father and next friend, as plaintiffs, against John Bellamy, Norris Tildasley Foster, and Eliza Barnett as defendants, alleging that the defendants Bellamy and Foster had committed a breach of trust in offering for sale and selling the leaseholds, they having no power to sell the same or any part thereof; that the sale was effected by the defendants in spite of the expressed desire to the contrary of the plaintiff Alice Mary Perrins, and that, by reason of the sale, the income receivable by her had been diminished; and also alleging the commission of certain minor breaches of trust by the defendants Bellamy and Foster. The plaintiffs claimed a declaration that the defendants had been guilty of a breach of trust in selling the leaseholds, and also in respect of the other matters alleged; an inquiry what loss had accrued to the capital of the trust estate, and what loss had accrued to the plaintiff Alice Mary

Perrins by reason of such breaches of trust; and that the defendants Bellamy and Foster might be ordered to make good to the trust estate all loss that might be found to have accrued to it by such breaches of trust, and also all loss that might be found to have accrued to the plaintiffs by reason of such breaches of trust.

The defendants Bellamy and Foster by their statement of defence claimed the benefit of s. 3 of the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35). (1)

The action came on for trial with witnesses, and from the evidence given at the hearing the facts hereafter stated appeared.

The leaseholds were held for various terms of ninety-two years and upwards, commencing at different periods between the years 1853 and 1873. The shortest of these terms was one of ninety-nine years, commencing on March 25, 1853.

Soon after the death of Charlotte Barnett, the trustees Bellamy and Foster had to pay a sum of more than 600*l*. for estate duty, and it became matter for their consideration how this sum should be raised. The settled property, other than the leaseholds, consisted of investments of a high class, and the trustees accordingly resolved to raise the money by a sale of the leaseholds held for the shorter terms. The attention of the trustees being thus directed to the advisability of selling the leaseholds, they instructed a surveyor to examine and report upon the state of the leasehold property. From the report which was prepared accordingly it appeared that the houses were not well built, were devoid of bath-rooms and other conveniences suitable to modern requirements, and were likely to require frequent repairs, and the surveyor stated that the property was an undesirable one to be held by trustees.

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(1) Sect. 3, sub-s. 1, of that Act is as follows: "If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same."

The surveyor was called as a witness and gave evidence confirmatory of his report. In consequence of this report the trustees decided to sell the whole of the leaseholds, and the sale took place accordingly as above mentioned.

The trustees acted throughout on the assumption that they possessed a power of sale, and they did not, previously to the sale, take the advice of counsel nor apply to the Court for directions. The managing clerk to the firm of solicitors who acted for the trustees deposed that he advised the trustees that by reason of the power of varying investments contained in the settlement they had an implied power of sale.

From the evidence of Mrs. Perrins and her husband, it appeared that neither of them knew or supposed previously to the sale that the trustees did not possess a power of sale but they were under the impression that it was not competent to the trustees to sell without the consent of Mrs. Perrins. It was stated that Mrs. Perrins had prior to the actual sale addressed a letter to the trustees objecting to it, but it did not clearly appear that the trustees were aware that she entertained any positive objection to the sale.

It also appeared that the interest and costs directed to be paid by the trustees by the order of November 18, 1895, had been paid by them out of their own moneys.

The further facts of the case sufficiently appear from the judgment of his Lordship.

Bramwell Davis, Q.C., and *G. E. Tyrrell*, for the plaintiffs. After the decision of your Lordship on the summons under the Vendor and Purchaser Act, 1874, it is impossible for the defendants Bellamy and Foster to deny that they committed a breach of trust in selling leaseholds which they had no power to sell, and it is clear that the plaintiff Mrs. Perrins has been injured by their act, and, therefore, the only question is whether they are entitled to the benefit of s. 3 of the Judicial Trustees Act, 1896. It is conceded that they acted honestly, but in order to bring themselves within the section they must also shew that they acted "reasonably." This they did not do. It was unreasonable for them to proceed to a sale without obtaining the direction of the Court, or at all events taking the advice of counsel as to their right to sell, and without consulting the tenants for life, who were entitled to the rents and profits in specie, and whose income would necessarily be diminished by the sale of the leaseholds. It was also unreasonable for them to sell in disregard of the objection made by Mrs. Perrins to the sale. It is submitted that the evidence falls far short of shewing that the trustees believed that they possessed a power of sale. The utmost that can be said is that they did not trouble themselves about a matter which it was their duty to consider with care. Assuming, however, that they did act reasonably in offering the property for sale, it was unreasonable for them to proceed with the sale after they became aware of the purchaser's objection to the title: see *In re Kay* (1), where Romer J., though considering that an executor had acted reasonably in making payments out of an estate which turned out to be insolvent, and granting him relief under the section until the issue of the writ in the action for an account, refused to grant relief in respect of subsequent payments.

Warrington, Q.C., and *S. B. L. Druce*, for the defendants Bellamy and Foster, were not called upon to argue.

Bardswell, for the defendant Eliza Barnett, said that that lady approved of all that the trustees had done.

KEKEWICH J. The main question in this case, namely, as to the meaning which the Court ought to put upon the 3rd section of the Judicial Trustees Act, 1896, and how that meaning ought to be applied to particular facts, is one of extreme difficulty, and has been so regarded when it has arisen in other circumstances before other judges. The difficulty arises from the fact that the Legislature in a few words, intended no doubt to be perfectly clear and expressive, has thought fit to interfere with well-established doctrines of the Court of Chancery and Chancery Division, which are to be found in numerous authorities and text-books, ancient and modern, accepted by the profession as expounding the law relating to trustees and their

(1) [1897] 2 Ch. 518.

cestuis que trust. A large body of law is dealt with in a few words, which are apparently intended to introduce large alterations. The difficulty is to ascertain what those alterations are, and how they are to be applied.

Before I go to the details of the case, I will endeavour to apply the Act to the skeleton of it. There has been here a distinct breach of trust. It is impossible for the trustees, in view of my previous decision, to contend in this Court that they had any power, express or implied, to sell these leaseholds. Nevertheless, they have sold them, and by so doing they have committed a breach of trust. How the responsibility for that breach of trust is to be enforced, and what is the limit and extent of the remedies of the cestuis que trust, is a separate question. Broadly speaking, these trustees have committed a breach of trust, and they are responsible for it. But then the statute comes in, and the very foundation for the application of the statute is that the trustee whose conduct is in question "is or may be personally liable for any breach of trust." I am bound to look at the rest of the section by the light of those words, and with the view that, in cases falling within the section, the breach of trust is not of itself to render the trustee personally liable. Leaving out the intervening words, which merely make the section retrospective, I find when in general the trustee is to be relieved from personal liability. He is not to be held personally liable if he "has acted honestly and reasonably, and ought fairly to be excused for the breach of trust." In this case, as in the large majority of cases of breach of trust which come before the Court, the word "honestly" may be left out of consideration. Cases do unfortunately occur from time to time in which trustees, and even solicitors in whom confidence has been reposed, run away with the money of their cestuis que trust, and where such flagrant dishonesty occurs breach of trust becomes a minor consideration. In the present case there is no imputation or ground for imputation of any dishonesty whatever. The Legislature has made the absence of all dishonesty a condition precedent to the relief of the trustee from liability. But that is not the grit of the section. The grit is in the words "reasonably, and ought

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fairly to be excused for the breach of trust." How much the latter words add to the force of the word "reasonably" I am not at present prepared to say. I suppose, however, that in the view of the Legislature there might be cases in which a trustee, though he had acted reasonably, ought not fairly to be excused for the breach of trust. Indeed, I am not sure that some of the evidence adduced in this case was not addressed to a view of that kind, as, for instance, the evidence by which it was attempted to shew that these trustees, though they acted reasonably in selling the property, ought not fairly to be excused because the plaintiff Mrs. Perrins objected to their selling, and her objection was brought to their notice. In the section the copulative "and" is used, and it may well be argued that in order to bring a case within the section it must be shewn not merely that the trustee has acted "reasonably," but also that he ought "fairly" to be excused for the breach of trust. I venture, however, to think that, in general and in the absence of special circumstances, a trustee who has acted "reasonably" ought to be relieved, and that it is not incumbent on the Court to consider whether he ought "fairly" to be excused, unless there is evidence of a special character shewing that the provisions of the section ought not to be applied in his favour. I need not pursue that subject further, because in the present case I find no ground whatever for saying that these trustees, if they acted reasonably, ought not to be excused. The question, and the only question, is whether they acted "reasonably." In saying that, I am not unmindful of the words of the section which follow, and which require that it should be shewn that the trustee ought "fairly" to be excused, not only "for the breach of trust," but also "for omitting to obtain the directions of the Court in the matter in which he committed such breach of trust." I find it difficult to follow that. I do not see how the trustee can be excused for the breach of trust without being also excused for the omission referred to, or how he can be excused for the omission without also being excused for the breach of trust. If I am at liberty to guess, I should suppose that these words were added by way of amendment, and crept into the statute without due regard

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being had to the meaning of the context. The fact that a trustee has omitted to obtain the directions of the Court has never been held to be a ground for holding him personally liable, though it may be a reason guiding the Court in the matter of costs, or in deciding whether he has acted reasonably or otherwise, and especially so in these days when questions of difficulty, even as regards the legal estate, can be decided economically and expeditiously on originating summons. But if the Court comes to the conclusion that a trustee has acted reasonably, I cannot see how it can usefully proceed to consider, as an independent matter, the question whether he has or has not omitted to obtain the directions of the Court.

I return now to the question whether these trustees have acted reasonably, remembering that what I have to ascertain is whether they acted reasonably in breach of their trust. The breach consists in their having sold leasehold properties which they had no power to sell. If they had in fact had a power of sale, the plaintiffs could not succeed unless they shewed that the power had been improperly exercised. It is possible to make trustees liable for exercising a power without discretion, or in the absence of advice, or under circumstances which lead the Court to conclude that they were not doing their duty. But the effect of the Act seems to me to be to place such a sale of property as this by trustees upon the same footing whether they have or have not a power of sale, because it is impossible to apply the Act at all if there was such a power. Applying the Act to this case, it seems to me to say in effect that where trustees of leaseholds having no power of sale sell the leaseholds honestly and reasonably, and so that they ought fairly to be excused for their breach of trust in so selling, then they are to be relieved from personal liability. The point, therefore, to be considered is whether they sold reasonably.

The property was settled as leasehold. It consisted of a number of houses held for long terms. Some of them have been described as short terms, but they were all fairly long, so that it was quite possible that the houses would produce on sale a few years later as much as was realized in 1895. The terms were not so short as to make it imperative to consider whether the houses ought to be sold or not. The attention of the trustees to the character of the property seems to have been called by the necessity of raising a sum of about 600*l*. for estate duty. If they had possessed a power of sale I apprehend no reasonable man would say that they were wrong in raising the 600*l*. out of the leasehold property rather than by sale of first-class trust investments. On the matter being called to their attention they determined without more consideration to sell some of the houses held for the shorter terms. But then they inquired as to the other houses, and they took the advice of a surveyor who made a report, the accuracy of which he has confirmed in evidence before me. I will make the assumption, which is by no means in accordance with my own view, that the report was erroneous. Still the trustees were entitled to be advised by a professional man, and, in my opinion, would have acted unreasonably if they had not been so advised. They intended to act upon his opinion, and they would have acted unreasonably if they had not done so. The advice they received was perfectly distinct and clear. [His Lordship referred to the terms of the report as to the condition of the houses, and continued:—] I leave entirely out of my consideration the surveyor's expression of opinion that the property was an undesirable one to be held by trustees. That was a matter about which he was not concerned. It was not an improper remark for him to make, but it was a matter for the consideration of the trustees and their legal adviser. But having that report before them, the trustees, assuming as they did that they had a power of sale, were justified in considering the propriety of selling. It was no doubt open to them to communicate with the ladies who were entitled in moieties for life, and consult them as to the desirability of paying for repairs out of income and providing a sinking fund. It would have been reasonable for them to do that; but I cannot say that they were unreasonable for not doing it, if they supposed that they had a power of sale. Of course we know now that it would have been better for them if they had taken that course instead of acting independently. It is rather strange that the plaintiff Mrs. Perrins and her husband both thought, as appears from their

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evidence, that the trustees could not sell without her consent. And they were really right, because under the Settled Land Acts the sale might more properly have been carried out by Mrs. Perrins and her sister selling as tenants for life. That was the position of the trustees. They had determined, properly enough if they had the power, to raise the estate duty by a sale of some of the houses, and in addition to that they had before them the surveyor's report, which went to shew that as reasonable men they ought to sell the whole of the leaseholds. The only answer is this. The plaintiff Mrs. Perrins (in common with her sister Miss Barnett) was entitled to the income of the leaseholds in specie—that is, to such rent as could be got out of them during her life. That is her view, and it is strictly correct. But the trustees had other duties besides that of giving Mrs. Perrins what she was entitled to. They had to consider her children, who would take the whole property if Miss Barnett, who is unmarried, died without issue, or one-half in any event. I am somewhat astonished to find their father coming as their next friend and saying to the Court that it was not to the interest of the children that the houses should be sold. I do not know what is the age of Mrs. Perrins, but I will assume that she may live for twenty, thirty, or forty years. At the end of that time the leases will be running out, and the property left for the children will be worth little or nothing. I cannot doubt for a moment that in their interest the trustees have done the best thing they could. The trustees have sold the property advantageously, for it is not suggested that they have not obtained full value, and the result is that these children will be provided with a substantial sum of money in lieu of a wasting property of little value to them, and not likely to endure for their lives. On behalf of the children, I cannot see how the action can be maintained at all, and if the case had rested there, it might have been right to refer the matter to chambers to consider whether the action was for the benefit of the infants, and I have no doubt it would have been found that it was not for their benefit. Substantially the action is by Mrs. Perrins. She has lost income, and is entitled to complain of that, if the trustees have done wrong and cannot claim to be relieved. I do not think it is any answer to her to say that she could get back the property. I do not say that the trustees could not, though I see great difficulty in their way. But it is clear that Mrs. Perrins, by a proper action against the purchasers, making the trustees defendants, could insist upon a reassignment to the trustees upon the trusts of the settlement, of course making good to the purchasers the money paid by them to the trustees. If the reasonable character of the trustees' acts is not a defence, then I think Mrs. Perrins is entitled to hold them responsible for the loss of income which by reason of their acts she has presumably sustained. I say presumably because the evidence on that head was stopped, and I am not sure that I could judicially come to a clear conclusion as to the diminution of income. Not only are leasehold houses a wasting property, but they are apt to become more expensive as time goes on, and tenants are very likely to require more and more repairs to be done. I think, therefore, that Mrs. Perrins is entitled to maintain this action; but, for the reasons I have given, I think that she has failed to make out her case. I do not say what would have been the result independently of the Act of 1896. My present impression is that I should have been obliged to hold these trustees responsible for a breach of trust, and possibly to make them pay the costs of the action up to the trial. But I am stopped from doing that by the conviction that though they have committed a breach of trust they have acted reasonably, and therefore under the Act are in the same position as if they had possessed a power of sale and had exercised that power.

I ought to mention one further point which was taken by counsel in the summing-up of the plaintiffs' case. It was said that assuming that the trustees acted reasonably before they knew of the objection to the title raised by the purchasers, their conduct was unreasonable after they knew of that objection. There are several answers to that. The first is that many of the purchasers completed their purchases. Some were satisfied with the reply to their requisition, and others did not take the objection at all. Why should the trustees, assuming that they were acting reasonably in selling, be held to be acting unreasonably from the date when they found that the majority of the purchasers took the same view as they did, namely, that they had a power of sale? But, besides that, the trustees would have been put in a position of great difficulty if they had determined not to go on with the sale. If they had sold for a good price they might have left themselves open to objection for not having completed a contract, which was beneficial to the trust estate, simply because four out of seventeen purchasers had insisted on an objection to the title. No doubt they might have obtained the direction of the Court; but I am not prepared to say that, if in other respects they have acted reasonably, they are to be held to have acted unreasonably because they did not obtain the direction of the Court.

[His Lordship then dealt with the minor alleged breaches of trust, and having held that the trustees ought not to be made responsible in respect of them, concluded as follows :—]

The action, though maintainable, has not been of the slightest advantage to the parties concerned, and the action must therefore be dismissed with costs, the judgment as against Mrs. Perrins being limited in the usual way as respects property subject to restriction against anticipation.

Solicitors: *H. Tyrrell & Son, for J. B. Clarke & Co., Birmingham; Gamlen & Burdett, for Cottrell & Son, Birmingham.*

C. C. M. D.

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[1898 B. 2158.]

Will—Real Estate—Trust for Sale—Postponement of Sale—Mortgage, Absence of Power to—Improvements—Repairs.

A testator gave his real and residuary personal estate to trustees in trust for sale, with a power of postponement in the usual form, followed by a power (also in common form) during such postponement to manage and let the real estate and to make out of the income or capital of his real and personal estate any outlay they might consider necessary for renewals of leases, improvements, repairs, premiums on policies or otherwise for the benefit or in respect of his real or personal estate. The will contained no express power to raise money by mortgage or charge:—

Held, that the trustees had power to raise money by mortgage or charge of the real estate for the purpose of repairing houses forming part of the real estate.

Richard John Bellinger, by his will dated December 17, 1888, after appointing executors and trustees, one of whom was his wife, bequeathed various legacies, and also annuities to his eight children, and, by substitution, to the child or children of any deceased child. He then devised and bequeathed his residuary real and personal estate to his trustees in trust for sale and conversion and to hold the net proceeds, after payment of his funeral and testamentary expenses, debts, and legacies upon trust for investment, and out of the income of the investments (thereinafter referred to as his " residuary estate ") to pay an annuity to his wife in priority to all other annuities ; and, subject thereto, to apply the income of such residuary estate, and, so far as the same should not be sufficient for the purpose, a sufficient portion from time to time of the capital of such estate in payment of the several other annuities thereinbefore bequeathed ; and subject to the trusts aforesaid his trustees were to hold his residuary estate in trust for his grandchildren who should be living at the death of the survivor of his eight children in equal shares per capita. And the testator empowered his trustees, in the usual form, to postpone the sale and conversion of his real and personal estate so long as they in their uncontrolled discretion should think proper, but his real estate should, for the purpose of transmission, be impressed with the quality of personalty from the time of his death. And he empowered his trustees or trustee, "during such interval or postponement to manage and let on lease or otherwise for any term and subject to any conditions, or to cultivate my real and leasehold estates and to make out of the income or capital of my real and personal estate any outlay which they he or she may consider proper for renewals of leases or grants, payment of fines on admission to or enfranchisement of copyhold hereditaments, improvements, repairs, premiums or policies, or otherwise for the benefit or in respect of my real or personal estate." And the testator declared that the income produced from every part of his real and personal estate previously to the conversion thereof pursuant to the trusts thereinbefore declared should be applied in the same way as the income of investments. And the will then contained the usual powers for the trustees to apportion blended funds and determine questions, and, in addition to the ordinary powers, indemnity and right to reimbursement by law given to trustees, a power to sell any hereditaments subject to any conditions which could be used on a sale by an absolute beneficial owner and that they might consider expedient, and to employ and pay agents. The will did not contain any power to mortgage or, in express terms, any receipt clause.

The testator died on November 11, 1892, possessed of freehold properties consisting of a number of small houses in the East end of London, yielding an average rental, after payment of rates and taxes, repairs, collectors' commission, insurance and other outgoings, of about 450*l*. per annum, the total estimated value of the real estate being about 6000*l*. At the date of the testator's death several of these houses were in an indifferent state of repair, and required a considerable outlay, which was made by the trustees, with money borrowed by them for that purpose from the firm of collectors to the estate.

Part of the outlay was made in compliance with the requirements of the sanitary authorities, and still further expenditure was needed on the property, but the income of the testator's

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estate was insufficient for payment in full of the annuities to his children and grandchildren and to meet the required expenditure. Under these circumstances, and as the will contained no express power for the trustees to raise money by mortgage or charge, this summons was taken out by the executors and trustees of the will against a child and grandchild of the testator to have it determined (1.) whether, upon the true construction of the will, the plaintiffs had power, or might otherwise be authorized, to raise by mortgage of the real estate devised by the will, as they might think fit from time to time until a sale of all such real estate should be made, sufficient moneys to enable them to execute necessary and proper improvements and repairs upon such real estate as might remain unsold, and to properly manage the estate of the testator in accordance with the trusts and powers vested in them under the will; (2.) that subject to the determination of the first question the plaintiffs might be at liberty to raise by mortgage as aforesaid sufficient moneys for the purposes aforesaid, and that, if necessary, inquiries might be directed as to what improvements, drainage, or other works and repairs were necessary and proper, and how the costs and expenses of effecting and carrying out the same ought to be borne; (3.) how and by whom the interest upon all such moneys, if and when raised by mortgage or otherwise as aforesaid, ought to be kept down and discharged; and (4.) how the costs of and incidental to the application ought to be borne.

Renshaw, Q.C., and *W. L. Richards*, for the plaintiffs. The real question is whether the trustees have power to mortgage, notwithstanding the absence of any express power in the will. A power to mortgage is to be implied from the power to make any outlay for renewals of leases, &c., out of "capital." The rule appears to be that if there is a mere trust to convert out and out, there is no power to mortgage, but that if the circumstances justify the raising of a particular charge by mortgage, the Court will sanction that particular mode of raising it: Farwell on Powers, 2nd ed. pp. 558–9, where *Stroughill* v. *Anstey* (1) and other cases on the point are cited. We rely on the power to postpone a sale and the following power to make necessary expenditure out of "capital."

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(1) (1852) 1 D. M. & G. 635.

Godefroi, for the defendants. This is not a case in which *Stroughill* v. *Anstey* (1) and that class of cases applies. It is really governed by *Walker* v. *Southall* (2), where the will contained a trust for sale, but no power to mortgage, and North J. set aside a mortgage that had been made by the trustees.

KEKEWICH J. In my opinion it is impossible to give effect to the words of this will without holding that there is a discretionary power to charge the corpus of the real estate with the money required, if the trustees think fit, for improvements, repairs, premiums and so forth. First of all, there is a direct trust for sale. Then there is a power of postponement, and then a direction as to what is to be done while the real estate remains unsold. The testator says that the trustees are "to make out of the income or capital" any outlay which they may consider proper. The obvious construction of that clause is that the real estate—what we call "corpus," the real estate itself—is to be made available for these payments. That can only be done by mortgage, whether it be a legal mortgage or a memorandum of deposit creating a charge. But it is clear to my mind that the corpus of this real estate can be charged. It may be quite possible—though I do not wish to encourage it—that the trustees may have to come to the Court to ask how they ought to exercise their discretion as to raising money for particular improvements. If so, that can be done by adjourning the summons with liberty to apply. On this summons I have no difficulty in saying that upon the true construction of this will the trustees have power to charge the corpus of the real estate or of so much thereof as is for the time being unsold with money required for the purposes mentioned in the will, that is, "renewals of leases or grants, payment of fines" and so on. Accordingly, in answer to the first question, there will be a declaration that upon the true construction of the will the plaintiffs, the trustees, have power to raise by mortgage of the testator's real estate, or any part thereof, before the sale thereof,

(1) 1 D. M. & G. 635.

(2) (1887) 56 L. T. 882.

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sufficient money for renewals of leases, and so forth, following the words of the clause, and also power to raise similarly such moneys as may be required to make good the deficiency from time to time of the income of the testator's estate to keep down the eight annuities for the time being subsisting. In answer to the third question, there will be a declaration that the interest on the moneys raised ought to be kept down out of the income. The second question will stand over generally, with liberty to apply at chambers in case of any difficulty as to what or how much money ought to be raised. The costs of all parties will be taxed, and the trustees will raise them by mortgage in the way already mentioned.

Solicitors: *Anning & Co.*

G. I. F. C.

KEKEWICH J.
1898
Aug. 4.

In re FURBER.

[1897 F. 210.]

Costs—Conveyancing—Scale Fee—Negotiating Loan—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order under Act, Sched. I.*

The scale fee to "mortgagee's solicitor for negotiating loan" provided for by Sched. I. to the General Order under the Solicitors' Remuneration Act, 1881, is applicable to all cases of loans on mortgage, and is not confined to loans upon mortgage of freehold, copyhold, or leasehold property exclusively.

THIS was a summons by a solicitor, Richard Furber, to review the taxation of thirteen bills of costs directed to be taxed by an order of March 15, 1897. That order had been obtained after payment by the client, Miss Christiana Sarah Watkins.

In some of these bills Mr. Furber had charged, pursuant to Sched. I. to the General Order under the Solicitors' Remuneration Act, 1881, scale fees for negotiating loans to Miss Watkins on mortgages which comprised personal property, other than leaseholds, as well as real estate.

It appeared that Mr. Furber had acted as solicitor for Miss Watkins in obtaining loans for her on the security of her interest under the wills of two testators in estates which comprised personal as well as real estate. The loans had been obtained by Mr. Furber for Miss Watkins from other clients of his, and he had acted for the mortgagees as well as for Miss Watkins, and had, in addition to negotiating the loans, done the work of deducing and investigating title and preparing and completing the several mortgages. By the request of Miss Watkins the whole amounts advanced had been paid to her, by or through Mr. Furber, no deduction being made in respect of the mortgagees' costs. It was conceded by Mr. Furber that the costs of deducing and investigating title, and preparing and completing mortgages, must be made out under Sched. II. to the above-mentioned General Order, and not under Sched. I.

Objections to the taxation were carried in by both parties. The taxing master (Mr. Spofforth) made his certificate on March 31, 1898, and thereby disallowed the scale fees for negotiating loans. Mr. Furber then took out a summons to proceed, with the intention of obtaining the decision of the Court as to the negotiating fees. This summons was adjourned into court, and came on for hearing on May 26, 1898, when the preliminary objection on behalf of Miss Watkins was taken that, as Mr. Furber had not brought in objections to the disallowance of the negotiating fees, an application to review taxation could not be entertained. The Court, on the authority of *Strousberg* v. *Sanders* (1), held that the objection was good, and declined to consider the question of the negotiating fees.

Mr. Furber then moved before Kekewich J. for an order that the taxing master's certificate be discharged, on the ground that it was made and delivered at the same time as his answers to objections, thus depriving Mr. Furber of his right to bring in objections to the disallowance of the negotiating fees. The motion was heard on June 7, 1898, when his Lordship ordered that the certificate should be set aside, and that it should be re-signed and dated June 20, 1898, so as to enable Mr. Furber to carry in his objections to the disallowance of the negotiating fees, each party paying their own costs. Miss Watkins appealed

(1) (1889) 38 W. R. 117.

against this order; but the Court of Appeal, on June 23, 1898, dismissed the appeal without costs.

The matter was then again considered by the taxing master, who formed the opinion that the scale fee under Sched. I. was not payable. In his answers to objections he said that that schedule provides three scale fees in respect of mortgages, namely, a deducing fee, a negotiating fee, and an investigating fee, described in the schedule as follows, and in the following order: "Mortgagor's solicitor for deducing title to freehold, copyhold, or leasehold property, perusing mortgage and completing," "Mortgagee's solicitor for negotiating loan," "Mortgagee's solicitor for investigating title to freehold, copyhold, or leasehold property, and preparing and completing mortgage"; and he drew the inference that the reasonable interpretation of the schedule, read in connection with rule 10 (1) thereunder, was that the scale fee for negotiating, like the scale fee for deducing and investigating, was confined to mortgages of freehold, copyhold, or leasehold property, and that therefore Sched. I. was not applicable so as to make the scale fee for negotiating payable in the present case. He accordingly disallowed the scale fee charged; and in consequence of such disallowance the present summons was taken out, and now came on for hearing.

P. O. Lawrence, Q.C., and *G. Henderson*, for the applicant, Mr. Furber, in support of the summons. By the terms of Sched. I. a scale fee is made payable to the "mortgagee's solicitor for negotiating loan." The words are general, and there is no sound reason for restricting the word "loan" to a "loan" on mortgage of freehold, copyhold, or leasehold property. The General Order by its terms, which are in accordance with s. 2 of the Solicitors' Remuneration Act, 1881, relates to "matters of conveyancing" generally, and is not limited to freehold, copyhold, or leasehold property, and the heading to the schedule is general. No doubt the word "loan" as here used must be confined to loans on mortgage; and that it ought to be so construed was decided in the Irish case of *D'Arcy to White*. (1) But the taxing master held that because the items immediately preceding and immediately following are restricted to freehold, copyhold, and leasehold property, therefore that restriction must by implication be introduced into the intermediate item. It must be remembered, as was pointed out in *In re McGarel* (2), that the schedule was carefully prepared by very competent persons, and it ought not to be assumed that there was no ground for the distinction in phraseology between this item and its predecessor and successor. On the contrary, there was very good ground. The deduction and investigation of title to freehold, copyhold, or leasehold property does not, so far as the labour of the solicitor is concerned, vary greatly in character, but in the case of personal property the variation is great, and the scale if applied to such property might work injustice. But the labour connected with the negotiation of the loan is the same whatever the nature of the mortgaged property may be. The same distinction, and for the same reason, is to be observed in the items in the schedule relating to sales and purchases. There the word "property" is used without limitation where negotiation is referred to, but is confined to freehold, copyhold, or leasehold property in the case of deduction or investigation of title. In truth, if the general character of the order is borne in mind, the argument from juxtaposition really tells against the conclusion of the taxing master rather than for it.

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(1) Rule 10 is as follows: "The above scale as to mortgages is to apply to transfers of mortgages where the title is investigated, but not to transfers where the title was investigated by the same solicitor on the original mortgage or in any previous transfer; and it is not to apply to further charges, where the title has been so previously investigated. As to such transfers and further charges, the remuneration is to be regulated according to the present system as altered by Sched. II. hereto. But the scale for negotiating the loan shall be chargeable on such transfers and further charges where it is applicable."

Warrington, Q.C., and *Stewart-Smith*, for the respondent, Miss Watkins. The taxing master did not rely solely upon the argument from juxtaposition, but also upon the construction of rule 10 in Sched. I., which throws light on the meaning of the schedule. When the items in the schedule as to mortgages are read together with that rule, it appears to be clear

(1) (1893) 31 L. R. Ir. 142. (2) [1897] 1 Ch. 400.

that the subject-matter of the schedule is mortgages of freehold, copyhold, and leasehold property, and loans upon such mortgages only, and that the scale fee for negotiating is applicable to such loans only.

[They also contended that as the scale fee for negotiating was payable to the "mortgagee's solicitor," it could not rightly be included in a bill of costs delivered to the mortgagor.]

KEKEWICH J. The question raised on this summons is one of general importance to the profession. It is whether a solicitor can charge a scale fee for negotiating a loan though the loan is not to be advanced on a mortgage of freehold, copyhold, or leasehold property exclusively. The view of the taxing master is that the scale fee is to be confined to loans of that character, and the contention of the solicitor here is that the taxing master is wrong, and that it ought not to be so restricted. It is, I think, perfectly clear that the word "loan" means a loan on mortgage. The only person who is to be allowed the scale fee for negotiating the loan is the mortgagee's solicitor, and therefore, if there is no mortgage, the fee is not payable. I am not aware of any decision of the Court precisely on the point, but in the Annual Practice an Irish case of *D'Arcy to White* (1) is referred to as shewing that "loan" means "loan on mortgage," and I do not think there can be any doubt about it, because the schedule is headed "Scale of charges on sales, purchases, and mortgages and rules applicable thereto." Why the word "loan" was introduced I do not know; but I must assume that it was advisedly introduced by those who drew these rules. They were learned and practical men, conversant with these matters, and if they had intended that the scale fee should be for a loan on mortgage of freehold, copyhold, or leasehold property exclusively, they ought to have said so, and my conclusion is that they would have said so. But the argument is that they have said it plainly by putting this particular scale fee in between two other scale charges, namely, one to the "mortgagor's solicitor for deducing title to freehold, copyhold, or leasehold property, perusing mortgage

(1) 31 L. R. Ir. 142.

and completing," and the other to the "mortgagee's solicitor for investigating title to freehold, copyhold, or leasehold property, and preparing and completing mortgage," and it is said that therefore the intervening scale fee for negotiating loan must refer to the same thing. Now, with the greatest respect to those who give weight to that argument, it seems to me to point directly the other way. It is because the scale fee for negotiating stands alone, and in that direct contrast, that it seems to me that the word "loan" ought to be construed as meaning a loan irrespectively of freehold, copyhold, or leasehold property, and not as mentioned in that connection. But then it is said that rule 10 supports the contrary view. [His Lordship referred to the rule, and continued:—] The proviso, at the end of the rule, that the scale for negotiating the loan shall be chargeable on such transfers and further charges where it is applicable is relied on as shewing that that fee is to be limited to transfers and further charges of freehold, copyhold, or leasehold property. But, in my opinion, the proviso refers to the scale, which, I suppose, means scale fee, for negotiating as something independent of, and standing apart from, the property which is the subject of the transfers and further charges referred to. My conclusion—and I am bound to say that but for the opinion of the taxing master I should have had very little hesitation about it—is that "negotiating loan" means "negotiating loan" of any kind provided the loan is on mortgage. It would not, for instance, include the case of a loan upon a promissory note, or money borrowed from bankers without any specific security. I think it is erroneous to suppose that because some property comprised in a mortgage is not of the particular kind to which title is deduced, or of which the title is investigated in the manner indicated in the schedule, therefore the scale fee for negotiating ought not to be charged.

[His Lordship then dealt with the argument that the negotiating fee being only payable to the mortgagee's solicitor was not rightly included in the bill of costs of the mortgagor's solicitor, and held that, under the special circumstances of the case, the amount of that fee, being as between Mr. Furber

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and Miss Watkins payable by her to him, was rightly included. His Lordship continued :—]

The result is that I must remit the matter to the taxing master with an intimation of my opinion that Mr. Furber is entitled to charge the scale fee for negotiating loan notwithstanding that there was no mortgage of freehold, copyhold, or leasehold property exclusively.

Solicitors: *R. Furber; Mear & Fowler.*

C. C. M. D.

In re HODGSON.
TAYLOR *v.* HODGSON.

[1898 H. 617.]

ROMER J.
1898
Aug. 2.

Advowson—Description—"Real Estate in the County of L."—Surrounding Circumstances—Will—Intention.

An advowson in gross, though not aptly described as a hereditament or real estate "situate" or "in" a particular county or place, may pass under a devise of "all other my real estate in the county of L." where the surrounding circumstances or the presumed intention of the testator admit of such a construction.

Crompton v. *Jarratt*, (1885) 30 Ch. D. 298, examined and distinguished.

A testator gave one of his sons the option of acquiring a family estate, "and all other my real estate in the county of L.," at a certain price, as part of his share under the will, and, in the event of his exercising such option, devised to him the said estates absolutely. The testator owned two advowsons, both situate in the county of Lincoln, and close to the estate which he had purchased at the time of buying the said estate. The son having exercised his option to take the estate at the price named by the testator, the question was now raised whether the advowsons, being in gross, passed under the words "other real estate in the county of L.":—

Held, under the circumstances, that these words were sufficient to pass the advowsons to the son.

ADJOURNED SUMMONS.

This was an application for the opinion of the Court upon numerous questions of construction arising in the administration of the estate of the late George Hodgson; the only point argued which requires any notice in this report was, whether two advowsons in gross passed to one of the testator's sons under a gift of "all other my real estate in the county of Lincoln." The facts, so far as material, were as follows:—

The testator by his will of May, 1895, after giving specific and pecuniary legacies and an annuity of 1000*l.* to his wife, and disposing of the assets and goodwill of his business of a machine maker at Bradford between his sons John and George, and "subject to the option hereinafter given to my said sons successively in real and personal property belonging to me in the county of Lincoln," devised and bequeathed all the real and

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personal estate and effects whatsoever and wheresoever of or to which he should die possessed or entitled or have power to dispose of as follows: Two equal seventh shares to his said son John; two other equal seventh shares thereof to his said son George, and the remaining three equal seventh shares thereof to his three daughters in equal shares. The testator then directed and declared that his said son John should have the option of acquiring at the sum of 185,000*l.*, and as part of his said two seventh shares, "All that my manor of Nocton with the freehold messuage known as Nocton Hall, and with the ground and outbuildings thereto belonging and the lands held with the same commonly known as the 'Nocton Hall estate,' all situate in the county of Lincoln, and all other my real estate in the county of Lincoln," with the furniture, pictures, and chattels therein at the time of his death, such option to be exercised in writing within three months of the testator's death. A similar option was then given to the second son George in the event of John's refusal of this gift; and on such option being exercised, then he devised and bequeathed the said hereditaments and premises in the county of Lincoln, and the said chattels in Nocton Hall aforesaid, to the son so having exercised the said option as aforesaid, subject to his accounting for the sum of 185,000*l.*, the value of the said premises, as part of his two seventh shares, but such son was not to be called upon to pay that amount, but should be merely debited with the same in ascertaining his share.

The testator died in June, 1895, and in the following July the son John duly exercised the option given him to acquire the Nocton Hall estate and the chattels at 185,000*l.*

In 1890, the testator had purchased the perpetual rights of patronage and presentation of and to the vicarages of Nocton and Dunston, at the same time and under the same contract that he purchased the Nocton Hall estate, which contained 7287 acres, and the manors of Nocton and Dunston, and all these hereditaments were conveyed to him by one deed, dated January 24, 1890. The testator subsequently purchased small portions of real estate adjoining, or mixed up with, these estates, and the whole were known as the Nocton Hall estate.

The advowsons were not appendant to the manors of Nocton and Dunston.

It appeared from the statement of facts, that the parish church of Nocton was 250 yards distant from Nocton Hall, was surrounded by the churchyard, which was bounded on the south and west by glebe lands of the vicarage of Nocton, and on the east by the gardens and pleasure-grounds of Nocton Hall, and that there was a private footpath leading from Nocton Hall to Nocton church; that the parish church of Dunston and the glebe lands of the vicarage were about one mile distant from Nocton Hall, and about 500 yards from the nearest point of the park. Both churches were in the county and diocese of Lincoln, and were practically surrounded by the Nocton Hall estates.

One of the questions decided by the Court was that the wording of the will, as stated above, coupled with the exercise of the option by John Hodgson, amounted to a specific devise and bequest to him of the manor of Nocton and the Nocton Hall estates and the chattels in Nocton Hall. The question was then argued whether the advowsons of Nocton and Dunston also passed to him under this devise.

Neville, Q.C., and *Rowden*, for the plaintiff, one of the daughters of the testator. These advowsons being in gross, would not pass under a gift of hereditaments "in" or "situate in" the county of Lincoln; being incorporeal hereditaments, they are not aptly described as being "situate" anywhere: *Crompton* v. *Jarratt* (1); particularly where, as in this case, the testator has other real estate in the same county which will answer the description. *Kensey* v. *Langham* (2) when examined supports this contention: the devise in that case contained the words "hereditaments"; the question sent by the Lord Chancellor to the King's Bench was, "whether the advowson by this devise passed to the trustees," and not whether the word "tenement" would pass the advowson. [They referred to the manuscript note of the case by the late Mr. Cox of Lincoln's Inn from the library of that society.]

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(1) 30 Ch. D. 298.

(2) (1735) Cas. t. Tal. 143.

[ROMER J. It is clear, from the manuscript which has been handed up to me, that "hereditaments" was the word chiefly relied on in argument.]

The certificate given was "that the adowson did not pass by the devise in question." There is no evidence on this will of any intention on the part of this testator to devise these advowsons with Nocton Hall; the rule is that an advowson primâ facie does not pass under a gift of "hereditaments" in or situate in a certain county or parish, if there are other lands to satisfy the description. The testator purchased other lands in the county of Lincoln subsequently to the purchase of these advowsons; the words here are "real estate," which are not so wide as "hereditaments."

J. G. Wood, for another daughter, supported this contention.

Levett, Q.C., and *Ingpen*, for the son John Hodgson. In construing this devise, surrounding circumstances may be looked at: the original conveyance in 1890 included these advowsons with the rest of the estates. Nocton Church is practically in the park; the other church is surrounded by the estate; and, looking at the will as a whole in the light of these circumstances, it is clear the testator meant these advowsons to go to his son with the rest of the Nocton Hall estate.

"Other real estate in the county of Lincoln," though not apt words, will pass an advowson if you can gather from the rest of the will an intention that they should: *Crompton* v. *Jarratt.* (1) In that case the advowson was held not to pass; but that was a carefully framed deed, which is construed more strictly than a will; and there were also the recitals from which the Court extracted an intention not to include the advowson in the deed of resettlement. "Hereditaments situate in T." were held to pass an advowson in *Anonymous Case.* (2) This case is in favour of our contention.

Neville, Q.C., in reply.

Farwell, Q.C., and *A. Adams; Alexander, Q.C.*, and *Dibdin; Vaughan Hawkins*, and *R. F. Norton*, for other defendants, did not address the Court on this question.

(1) 30 Ch. D. 316, 318. (2) (1573) 3 Dyer, 323 b.

ROMER J. This is an extremely doubtful point in my opinion, but the conclusion I come to is that these advowsons ought to be held to pass by this devise. The words in the will, "all other my real estate in the county of Lincoln," like the words "hereditaments situate in the parish of Doncaster" in the case of *Crompton* v. *Jarratt* (1), are both expressions which might include advowsons, though I agree they are not apt words to include them. I refer to what was said by Cotton L.J. in the report of that case (2), and to the observations of Bowen L.J. (3) In *Crompton* v. *Jarratt* (1) the Court, looking at the deed as a whole including the recitals, came to the conclusion that the words "hereditaments situate in the parish of Doncaster," though they might include the advowson in question in that action, did not pass it on the true construction of the deed of resettlement. They came to this conclusion looking at the deed as a whole, and considered that in that particular deed the words I have just mentioned ought not to be held to include the advowson.

Now, bearing that case in mind, I approach this will, and I think that I am entitled to consider these circumstances. It appears that this testator bought this property in 1890; it was a large estate, and he bought it as a whole including the advowsons in question, and he held the estate, including the advowsons, as one estate up to the time of his death: the advowsons relate to two churches which are both surrounded by the estate, or, if I may use the expression, are situated on the estate. One church is within the park and close to the Hall; the other is some little distance away. Now, looking at this will, am I not entitled to say here that the testator's intention was to put his son in his position as the owner of the estate as a whole? I think he did intend that; I cannot help thinking that the testator never contemplated that these two advowsons should be held separate and apart from the rest of this property; I think he intended his eldest son to hold this property as one as he himself had held it; and, indeed, I am not sure if the words "all other my real estate in the county of

(1) 30 Ch. D. 298.

(2) 30 Ch. D. 316.

(3) 30 Ch. D. 318.

Lincoln" do not refer to these advowsons to what they could refer. It does appear that after the date of his will, and after the date of the original purchase of the Nocton estates and these advowsons, the testator bought some few acres of land which were practically surrounded by this estate, and added those acres to his property; but it appears to me that those acres would have passed under the earlier description in the will as "lands held with the same commonly known as the Nocton Hall estate," and would not have required those additional words which have been so much commented upon to pass them; so that if these words do not cover the advowsons, it is difficult to say to what they could have applied.

But I do not rely so much upon that as I do upon the general tenor of this will construed, as I am entitled to construe it, with reference to the surrounding circumstances. I think that there is sufficient to enable me to say in this case, being the case of a will with that general expression "all other my real estate in the county of Lincoln," that those words, though not apt words for the purpose, yet being such words as might pass them, do in this particular case before me pass these advowsons to the eldest son John; and I so hold.

Solicitors: *Peacock & Goddard; Swann & Co., for Tweed, Stephen & Dashper, Lincoln; Bell, Broderick & Gray, for Weatherhead & Knowles, Bradford; Seal & Co., for North & Sons, Leeds; Flower, Nussey & Co., for Killick, Hutton & Vint, Bradford; Ridsdale & Son, for Hartley, Settle; J. J. Harlow, for Grange & Wintringham, Grimsby.*

W. C. D.

COWEN *v.* TRUEFITT, LIMITED.

[1897 C. 2162.]

ROMER J.
1898
July 6, 7:
Aug. 6.

Lease—Construction—Parcels—Right of Way—Misdescription—Falsa demonstratio.

In construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect.

Rooms on the second floor of Nos. 13 and 14, Old Bond Street, were demised, together with free ingress and egress for the lessee "through the staircase and passages of No. 13" to and from the demised premises; there was no staircase in No. 13 leading to the demised premises, but there was a staircase in No. 14.

Held, on the true construction of the lease, that a right of access over the staircase in No. 14 passed to the lessee, and that the words "of No. 13" might be rejected as falsa demonstratio.

Wrotesley v. *Adams*, (1558) Plowd. 191, discussed and applied.

ACTION.

The dispute between the plaintiff and defendants which led to this action, arose out of a claim by the plaintiff to the use of a staircase, leading to four rooms on the second floors of Nos. 13 and 14, Old Bond Street, which had been demised to the plaintiff by the defendants for a term of seven years from December, 1895, at a rent of 250*l.* per annum. The action was tried with witnesses, and a good deal of conflicting evidence was given as to the representations made to the plaintiff during the negotiations which resulted in the granting of the underlease; but the construction of this underlease, and particularly of the wording of the grant of access to the demised premises, was the only part of the case which calls for any notice in this report.

The facts, so far as material, and as found by the Court, were as follows:—

The plaintiff carried on the business of ladies' tea-rooms and a ladies' club. The defendants were the occupiers and owners for a term of years of Nos. 13 and 14, Old Bond Street, where they carried on a hairdressing and perfuming business.

By an underlease of December 24, 1895, four rooms on the second floors of Nos. 13 and 14, and one room on the third floor of No. 14, were demised to the plaintiff, "together with free ingress and egress for the lessee, her servants, and customers through the staircase and passages of No. 13 aforesaid to and from the premises hereby demised on the second floor of the said messuages Nos. 13 and 14 aforesaid, and through the staircase and passages of No. 14 aforesaid from the second floor of the said premises to and from the room hereby demised on the third floor of No. 14 aforesaid, at all times during the term hereby granted."

It appeared that there was no staircase in No. 13 leading from Old Bond Street directly to the demised premises, the only staircase which gave such access having been pulled down when the lift was made in 1893; there was, however, a staircase in No. 14, but, as this was entered through the defendants' shop on the ground floor of No. 14, the defendants declined to allow the plaintiff to use this staircase except in case of fire or other emergency, and insisted that she and her customers must gain access to the demised premises by means of the lift in No. 13, for the use of which by the plaintiff special provisions had been made by the underlease.

It was admitted that the reference in the underlease to the staircase by which access was granted was not in accordance with the facts, and had been inserted in this form by mistake.

The plaintiff claimed a declaration that under the circumstances attending the negotiations and granting of the underlease, and upon the true construction thereof, she was entitled to a right of access to the demised premises through the shop by the staircase in No. 14.

The defendants counter-claimed for rectification of the underlease, on the ground of common mistake, by striking out from the grant the words "the staircase" and all other words purporting to grant any right of way other than the right to use the lift in No. 13, and the passages leading thereto and therefrom.

Farwell, Q.C., and *Stock*, for the plaintiff. On the true construction of this grant, a right of access to the staircase leading to the demised premises was given to the plaintiff, and the words "of No. 13" is falsa demonstratio, and may be disregarded. Here we have a general and special description of the parcels, and nothing in existence which satisfies all the descriptions, though something exists which satisfies some of them with sufficient certainty; the erroneous description may, therefore, be disregarded: Elphinstone on Interpretation of Deeds, pp. 157 and 158. A right of access by the staircase that does lead to the demised rooms, that is the one in No. 14, must be held to pass to the plaintiff.

Levett, Q.C., and *J. R. Brooke*, for the defendants. At the time the underlease was granted, ingress and egress through the staircase and passages of No. 13 was not possible; all the surrounding circumstances indicate a common mistake. The doctrine of falsa demonstratio does not apply to this case: you cannot construe a grant of way over the staircase of No. 13 into a grant of way over the staircase in No. 14. The back staircase in No. 14 does not satisfy any part of the description; if you reject the words "of No. 13" as falsa demonstratio, you reject the whole description. The rule is correctly stated in Elphinstone at p. 157, but the application made of it by the plaintiff is erroneous. The lease ought to be rectified to carry out the intentions of both parties.

Farwell, Q.C., in reply. We have here an adequate and sufficient description of "the staircase and passages" which lead to and from the demised rooms, and the subsequent erroneous description does not vitiate this grant: the description is certain without the addition of the words "of No. 13." It is clearly a case of falsa demonstratio.

Cur. adv. vult.

Aug. 6. ROMER J. The first point which arises concerns the true construction of the underlease to the plaintiff, and may be shortly stated as follows: [His Lordship having shortly stated the facts and the words of the grant, continued:—] Now there was and is a staircase leading to and from the demised rooms, and no other way to which the grant of the right of ingress and egress could apply; but this staircase is in No. 14, and not in No. 13. There is a staircase in No. 13, but it does not lead to the demised rooms, and it is now common ground that that staircase was certainly not demised or referred to by the grant in question. The question is whether under these circumstances, as a matter of construction of the underlease, a right of way over the staircase that does lead to the rooms must not be held to pass, and the words in the grant "of No. 13" be rejected as falsa demonstratio. To my mind the point is one of great difficulty. Since the trial I have considered the numerous authorities bearing on the point, some of which are not easy to reconcile, and in the result I have come to the conclusion that on this question of construction the plaintiff is right.

The principle upon which the cases bearing on the point have been decided has been variously stated. One way in which it may be put is the following: "In construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect." And Parke J., in *Doe* v. *Galloway* (1), stated the principle as follows: "The rule is clearly settled, that when there is a sufficient description set forth of premises by giving the particular name of a close, or otherwise, we may reject a false demonstration." Among the numerous authorities illustrating the principle I will select the case of *Wrotesley* v. *Adams* (2), for the observations of the Court in that case at p. 191 of the edition of 1816 appear to me to bear directly on the case before me. The Court there had to consider the effect of a lease of all the lessor's farm in Brosley, then in the tenure and occupation of Roger Wilcox, and decided that inasmuch as the word "farm" signified the capital or

(1) (1833) 5 B. & Ad. 43, 51.

(2) Plowd. 191.

chief messuage or house and all the lands lying to it, and so had a certainty in itself, the Court could disregard the erroneous description of "in the tenure and occupation of Roger Wilcox," because "there is a certainty in the thing demised, viz. the farm in Brosley, and so another certainty put to a thing which was certain enough before, is of no manner of effect"; and the Court distinguished the case from one where the property was merely described by an uncertain (i.e. by a general) description followed by a certain one, and the distinction was illustrated thus—"A release of all my right in all my lands in Dale which I have by descent on the part of my father, and I have lands in Dale but none by descent on the part of my father, there the release is void; but a release of Whiteacre in Dale which I have by descent on the part of my father is good if I have Whiteacre, though not by descent on the part of my father." Now, when I come to apply this principle to the case before me, considerable difficulty arises owing to the wording of the grant of the right of way, and especially to the position of the words "of No. 13." But, looking at the question as one of substance rather than of form, it appears to me that the most important matter to be borne in mind in construing the grant is that it is a right of way over *the* staircase and passages which led to and from the demised rooms. This causes no ambiguity or doubt whatever: the way is made certain, and is in no sense described in an uncertain or general manner. Then does the addition of the words "of No. 13" compel the Court to hold that the otherwise clear grant is to be held void, or cannot the Court reject the words as being "falsa demonstratio"? In my opinion the latter is the correct view, and the Court ought to hold the deed effectual as granting the right of way over the only access which could have been referred to by the grant in question. I think no difference ought to be drawn between this grant according to its actual wording and a grant worded thus, "Together with free ingress and egress for the lessee, her servants and customers, through the staircase and passages which led to and from the demised rooms and which are in No. 13," where I think comparatively little difficulty would have been felt by the Court in rejecting the added words, "and which are in No. 13." For these reasons I construe the grant in favour of the plaintiff's contention, though I feel great doubt on the point.

[His Lordship then considered the evidence, and dismissed the defendants' counter-claim with costs.]

Solicitors: *W. Hilton Perkin; W. H. Herbert.*

W. C. D.

ROMER J.
1898
July 22;
Aug. 11.

In re S. FROST & CO., LIMITED.

Company—Issue of fully paid-up Shares—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Registered Contract—Sufficiency—Statement of Consideration—Property purchased described merely by reference to prior Contract.*

Where the contract registered under s. 25 of the Companies Act, 1867, on the issue of fully paid-up shares described the property sold merely in a recital of a prior contract entered into between the vendor and a trustee for the company as "certain leasehold messuages, shops, and premises," together with "the goodwill of the several businesses carried on by the vendor upon the same," together with the "machinery, plant, horses, vans, carts, fixtures, and fittings used in connection with the said several businesses":—

Held, that the consideration for the issue of the shares was sufficiently stated.

In re Maynards, Limited, [1898] 1 Ch. 515, not followed.

MOTION on behalf of shareholders in the above company that the register of the members of the company might be rectified by striking out therefrom the names of the respective applicants as the holders of shares respectively set opposite their names.

By an agreement dated October 7, 1895, and made between Samuel Frost (thereinafter called the vendor) of the one part, and W. H. Chandler (thereinafter called the trustee), for and on behalf of the company thereinafter referred to and which was about to be formed, of the other part, the vendor agreed to sell and the company to purchase the respective leasehold shops, messuages, and premises mentioned in the schedule thereto, together with the goodwill of the several businesses carried on upon the premises, together with all machinery, plant, horses, vans, carts, fixtures, and fittings used in connection with the several businesses. The consideration to be paid to the vendor for the sale was to be the sum of 20,000*l.*, payable as to one moiety thereof in cash, and as to the remaining moiety in fully paid-up shares of the company; and it was thereby provided that the proportions of the purchase-money payable in shares and cash respectively might be varied by substituting other classes or amounts of shares of the company, or a larger or less amount of cash and shares respectively, as the directors of the company and the vendor might thereafter mutually agree upon.

The company was duly incorporated on October 9, 1895, with a nominal capital of 100,000*l.* divided into 100,000 shares of 1*l.* each.

By another agreement dated October 21, 1895, and made between the vendor of the first part, W. H. Chandler of the second part, and the company of the third part, the company adopted and confirmed the last-mentioned agreement; and it was provided that the purchase-money of 20,000*l.* should be paid as follows, that is to say, by the allotment to the vendor, or as he should direct, of 15,689 fully paid-up ordinary shares of 1*l.* each, of 1717 fully paid-up preference shares of 1*l.* each, of 75 fully paid-up founders' shares of 1*l.* each, and by the payment to the vendor of 2519*l.* cash, and further that, before any of the fully paid-up shares were issued, a proper contract should be filed with the Registrar of Joint Stock Companies.

By an agreement dated November 18, 1895, and made between Samuel Frost of the one part and S. Frost & Co., Limited, of the other part, after reciting that by an agreement dated October 7, 1895 (being the agreement first above mentioned), it was agreed that "the vendor should sell and the company should purchase certain leasehold messuages, shops, and premises, and that he should grant to the company and the company would accept the lease of certain other premises, and that the vendor should sell and the company should purchase all the goodwill of the several businesses carried on by the vendor upon the same respective premises, together with all the machinery, plant, horses, vans, carts, fixtures, and fittings

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used in connection with the said several businesses as therein mentioned"; and after reciting the formation of the company and the agreement above mentioned of October 21, 1895, it was witnessed and agreed as follows: "(1.) The company shall forthwith cause this agreement to be filed with the Registrar of Joint Stock Companies. (2.) The company shall on or before November 30, 1895, allot to the vendor or his nominees (the shares mentioned in the agreement of October 21, 1895). (3.) The said shares shall be accepted by the vendor in full satisfaction of 17,481*l.*, being that portion of the purchase-money of 20,000*l.* which under the hereinbefore-recited supplemental agreement (October 21, 1895) was to be satisfied by the allotment of fully paid-up shares. In witness, &c."

The agreement of November 18, 1895, did not contain any copy of the schedule to the agreement of October 7, 1895, or any further reference to the property comprised therein, and it was duly filed with the Registrar of Joint Stock Companies on November 21, 1895, and the shares therein mentioned were shortly afterwards issued to the vendor and to his nominees.

Doubts having been raised as to the sufficiency of the contract of November 18, 1895, so registered as aforesaid to protect from liability the fully paid-up shares issued to Samuel Frost and his nominees thereunder, having regard to s. 25 of the Companies Act, 1867, this motion was made.

The evidence shewed that the application was a bonâ fide one, and that the company was in a prosperous and flourishing condition.

T. H. Carson, for the motion. The question that has arisen in this case is whether the consideration for the sale of the shares is sufficiently stated in the contract filed under s. 25 of the Companies Act, 1867. The property sold is only described in the recital of the agreement of October 7, 1895, as "certain leasehold messuages, shops, and premises," without any reference to the schedule of the agreement of October 7, 1895. I submit that the consideration is not sufficiently stated. The case is not distinguishable from *In re Maynards, Limited* (1),

(1) [1898] 1 Ch. 515.

where Kekewich J. held that the contract was insufficient. I also rely upon *In re Kharaskhoma Exploring and Prospecting Syndicate.* (1)

Howard Spensley, Jun., for the company. I submit that the contract of November 18, 1895, does state the consideration which the company was to get for the issue of the shares with sufficient particularity. The consideration is stated to be the sale of certain leasehold "messuages, shops, and premises," and the goodwill and stock-in-trade, and that, I submit, is a sufficient "particularity" to constitute a sufficient contract: *In re Kharaskhoma Exploring and Prospecting Syndicate.* (1)

Cur. adv. vult.

Aug. 11. ROMER J. This case is one of considerable importance, and will, I am glad to understand, be brought before the Court of Appeal. I need, therefore, only state briefly my reasons for holding that the motion fails.

I have the misfortune to differ from some of the views expressed by my brother Kekewich in the very similar case of *In re Maynards, Limited* (2); but in that case I note that the point arising was not fully argued, and under the circumstances I think I ought to act on my own judgment in the present case.

To comply with s. 25 of the Companies Act, 1867, the contract filed must shew on the face of it the consideration, for that is an essential part of the contract; and accordingly in *In re Kharaskhoma Exploring and Prospecting Syndicate* (1), on appeal, it was held that where the so-called filed contract only referred to the consideration by stating it could be found in another document not filed, it would not comply with the section.

The question before me is whether in this case there is a filed contract, or whether what is filed is not in itself a complete contract because it does not sufficiently state on the face of it the consideration. If what is filed amounts in itself to a complete contract, including a proper statement of the consideration, then the section is complied with, and I know of no sufficient reason why the section should have a meaning or effect given to it beyond what is conveyed by the exact language used.

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(1) [1897] 2 Ch. 451.

(2) [1898] 1 Ch. 515.

Now, fairly viewed, is the consideration stated on the face of the filed document in the case before me? I think it is. The document shews that the consideration was (stating it shortly) that the vendor had agreed by a previous contract therein mentioned (but not filed) to sell and lease to the company certain leasehold premises, and to sell the goodwill of the business carried on by the vendor on those premises, together with the machinery, plant, horses, vans, carts, fixtures, and fittings used in connection with those businesses as therein mentioned. That is a short but, to my mind, sufficient statement of the consideration, and I do not think it was essential that the full particulars of the leasehold businesses and plant should be detailed in the filed contract. Indeed, if the other view be held, I do not know what limit could be placed on the particulars required to be set forth. Would a full list of the machinery, plant, horses, vans, carts, fixtures, and fittings be required, or if not, why not? It is not as if under the section it was made essential that any person seeing the filed contract should be able from it alone to ascertain the exact value of the consideration as compared with the shares to be allotted or cash paid. I can see nothing in the section requiring such particularity in the statement of the consideration. As previously observed, all that the Act says, so far as concerns the consideration, is that the registered document must be a contract—by which, no doubt, is meant a contract complete in itself, including the consideration; and I do not think that, apart from what can be gathered from the Act itself, the Court should construe the section by speculations or considerations as to what reasons may or may not have induced the Legislature to pass the Act. This being so, I do not see why it is required to state the consideration in the filed contract under s. 25 with more particularity than would be necessary, say, in stating it in writing in any agreement required by statute to be in writing. And it appears to me that a consideration stated with such particularity as that I am now considering would undoubtedly be held to be sufficiently stated, if in writing, to answer the requirements of any such statute as I have referred to. Take, for example, s. 4 of the Statute of Frauds, which covered guarantees before the Act 19 & 20 Vict. c. 97. Under that section certain agreements have to be in writing, signed by the party to be charged; and accordingly it has been held that the consideration must appear in writing: see *Wain* v. *Warlters* (1) and *Saunders* v. *Wakefield.* (2) Could it possibly be held under that section that a statement in a signed written agreement that the consideration was the sale of certain goods and chattels which had been handed over was insufficient, because the details of those goods and chattels had to be ascertained by parol evidence? I think not. And when I look at the judgments of the Lords Justices in the *Kharaskhoma Case* (3), it appears to me that they carefully guarded themselves from it being supposed that they considered the statement of the consideration in the contract to be filed under s. 25 of the Act of 1867 required such particularity as is insisted on in the case now before me.

Lastly, I may add that if such a document as I am considering be held no contract within the meaning of s. 25, then s. 25 will in my opinion prove to be a veritable trap. If the applicants before me are right, and this company had been wound up before they moved, the Court must have held them liable to pay in full on their shares, and many persons are likely hereafter to be made liable because they or their advisers had interpreted the word "contract" in s. 25 in what appears to me in a fair and reasonable way.

Solicitors: *Edmonds & Rutherford.*

(1) (1804) 5 East, 10, 13.
(2) (1821) 4 B. & Al. 595.
(3) [1897] 2 Ch. 451.

G. M.

ROMER J.
1898
Aug. 3, 11.

In re FLUDYER.
WINGFIELD *v.* ERSKINE.

[1898 F. 857.]

Executor—Retainer—Notice—Following Assets—Creditor of higher Degree—Succession Duty—Plene Administravit.

The settled rule that an executor who pays creditors without notice of the existence of a creditor of higher degree, is not liable to account for the sums so paid at the instance of that creditor applies to the retainer by an executor of a debt due to himself.

Blake v. *Gale*, (1886) 32 Ch. D. 571, 577, distinguished.

By the exercise of a joint power of appointment, 112,000*l.*, representing real estate, was withdrawn from a settlement and paid to a son in the lifetime of his father. The son died in 1895, leaving an estate worth 3200*l.* His executrix distributed the estate among creditors of equal degree, retaining the bulk of it in satisfaction of a debt of her own. The father having died in 1896, succession duty became payable, and the trustees of the settlement claimed that the duty on the 112,000*l.* ought to be paid out of the son's estate in priority to the other creditors:—

Held, that, the executrix having distributed the assets without notice of this debt, bonâ fide and without undue haste, the estate had been fully administered; and that the trustees, though creditors of a higher degree, had no right to follow the assets retained by the executrix in discharge of her own debt.

ADJOURNED SUMMONS.

The plaintiffs were the trustees of a family settlement of June 3, 1880; the object of the present application was to ascertain whether the estate of the above-named Charles Fludyer (a tenant for life in remainder) was liable to pay to them the succession duty claimed by the Crown on various sums of money, representing real estate, which had been withdrawn from the settlement by the exercise of a joint power of appointment, and advanced to Charles Fludyer during his father's lifetime.

The facts, so far as material, were shortly as follows:—

By an indenture of July 2, 1877, certain bank annuities and India bonds representing proceeds of sale of family estates, or money liable to be laid out in the purchase of real estate, to which Sir John Henry Fludyer, Baronet, was entitled as tenant for life under a settlement of January 29, 1822, and Charles Fludyer was entitled as tenant in tail, were disentailed and limited to such uses as Sir John Henry Fludyer and Charles Fludyer should jointly appoint.

In July, 1879, a sum of 65,000*l.* was raised out of the settled funds and paid to Charles Fludyer.

By an indenture of resettlement of June 3, 1880, and made between the said Sir John Henry Fludyer of the first part, the said Charles Fludyer of the second part, and the plaintiffs of the third part, the settled funds comprised in and assured by the disentailing deed of July 2, 1877, were limited to the uses upon and for such trusts and purposes, and subject to such powers and provisoes, agreements, and declarations as the said Sir John Henry Fludyer and Charles Fludyer should by deed jointly from time to time appoint, and subject thereto to uses in strict settlement, under which Sir John Henry Fludyer was tenant for life in possession, with remainder to the use of Charles Fludyer for life, and then to his first and other sons in tail, with remainder to the use of the second son Arthur John Fludyer, with remainders over.

Further sums of 42,000*l.* and 5000*l.* were subsequently raised out of the settled funds, by means of the joint appointment, and paid to Charles Fludyer.

In January, 1895, Charles Fludyer died without issue, having by his will devised and bequeathed all his real and personal estate, property, and effects unto and to the use of the defendant, whom he also appointed sole executrix. This will was duly proved by the defendant, the estate being worth about 3200*l.* The defendant paid some of the debts, including one to her sister of 1000*l.*, and retained the balance as part satisfaction of a debt of her own of 2181*l.*, which was owing to her from Charles Fludyer at the time of his death.

In August, 1896, Sir John Henry Fludyer died, and the settled fund devolved upon Sir Arthur John Fludyer, the present baronet, as tenant for life under the said resettlement of 1880.

The succession duty which became payable on the death of Sir John Henry Fludyer on the said several sums of 65,000*l.*, 42,000*l.*, and 5000*l.* was not commuted and paid prior to the same being made over to Charles Fludyer; and on the death of Sir John Henry Fludyer the Controller of the Legacy and Succession Duty Department at Somerset House claimed payment of succession duty from the plaintiffs as the trustees of the said settlement of June, 1880. The plaintiffs' contention was that this succession duty should be borne and paid out of the estate of Charles Fludyer in priority to other creditors against his estate, including the defendant, as a Crown debt.

Farwell, Q.C., and *Ingpen*, for the plaintiffs. The trustees are primarily liable to pay this duty, but are entitled to the Crown's priority if they pay: *In re Lord Churchill.* (1) The estate of Charles Fludyer is liable to pay this succession duty to the extent of the assets, and the defendant ought to have paid this debt before paying any of the ordinary creditors. The defendant might have retained her own debt as against creditors of equal degree, but not as against a Crown debt, which has priority over ordinary creditors. The amount retained by an executor in payment of his own debt, or share of the estate, can be recovered, because it remains in his hands as part of the estate: *Blake* v. *Gale.* (2) On this principle the defendant has not in fact parted with all Charles Fludyer's estate, and to the extent of the sum so retained his estate must pay this debt of higher rank which now falls due.

Levett, Q.C., and *Leverson*, for the defendant. At the date of Charles Fludyer's death the claim for succession duty had not and could not have been made. The defendant can plead plene administravit without notice; and had a right to retain her own debt, not having at that time any notice of any debts of superior degree: Williams on Executors, 9th ed. pp. 879, 889. If the plaintiffs' contention is right, that an executor who retains a debt or a legacy still has that portion of the estate in his hands, so that it can be recovered by a creditor of superior degree according to the dictum in *Blake* v. *Gale* (2), then an executor is the only person who cannot get safely paid.

Cur. adv. vult.

(1) (1888) 39 Ch. D. 174.

(2) 32 Ch. D. 571, 577.

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Aug. 11. ROMER J. Since the case of *Harman* v. *Harman* (1) it has been considered settled law that an executor who pays creditors without notice of the existence of a creditor of higher degree is not liable to account for the sums so paid at the instance of that creditor.

In the case before me the defendant distributed her testator's estate in paying his debts (including a debt due to herself which she retained out of the assets) without notice of the debt which the plaintiffs now seek to enforce, in good faith and without undue haste. It is admitted that these payments are good as against the plaintiffs, except as to the retained debt; but, with regard to that, the plaintiffs contend that the defendant must be considered to have the amount of that debt in her hands as executrix, for which she is liable to account. I cannot see the justice of this contention, and think it unsound. Why should her debt when paid be treated differently from the other debts paid by her? It would be very unfair as against the executrix that she should be held always liable to refund if an enforceable debt of higher degree, of which she had no notice, should afterwards appear to be due. It appears to me the simple answer to the plaintiffs' contention is that the debt in question is not in the hands of the defendant as executrix. She has been paid it, just as the other creditors have been paid their debts. Retainer is payment at law. If any authority is wanted for this it is supplied by the decisions that an executor under the plea of plene administravit can put in evidence retainer by him of his own debt: Williams on Executors, 9th ed. p. 1851.

There is no authority or principle that I can see which supports the plaintiffs' claim. The plaintiffs referred to the case of *Blake* v. *Gale* (2), where executors who were also some of the residuary legatees had retained their own share of residue, and were at the instance of creditors made liable to account for the shares of residue retained by them as being still in their hands. But that case is quite distinguishable. A legatee is a volunteer, and assets paid to him can be followed by a creditor: a creditor is not a volunteer, and a creditor of higher degree has no right, because of that position only, to follow assets in the hands of

(1) (1685) 2 Show. 492.

(2) 32 Ch. D. 571, 577.

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an executor retained by him in discharge of his own debt. For these reasons I decide against the plaintiffs. The form of order will be, "The Court being of opinion that Charles Fludyer's estate has been fully administered, dismiss the summons with costs."

Solicitors: *Arnold & Henry White; Upton, Atkey & Co.*

W. C. D.

In re HOCKING.
MICHELL *v.* LOE.

C. A.
1898
Aug

[1898 H. 1564.]

Will—Construction—Advancement Clause—" Expectant or Presumptive Share" —Impossibility of Issue—Woman past Child-bearing.

Where property is given to B. in the event of A. having a child, the Court will not enter into the question of A. being past child-bearing for the purpose of depriving B. of the chance of becoming entitled to the property.

A testator directed that, in the event of his sister A. marrying and having children, his property should be divided among the children of his sisters A. and B. upon the youngest child attaining twenty-one, but did not provide for the event of A. marrying and having no children; and he empowered his trustees to raise a portion of the expectant, presumptive, or vested share of any child of B. for his or her advancement.

Upon a summons by the trustees to determine whether the power of advancement was exercisable in view of the fact that A. was then a widow of fifty-four years of age, and had never had a child:—

Held (reversing Kekewich J.), that the power continued in operation during the lifetime of A.

Jee v. *Audley*, (1787) 1 Cox, 324, and *In re Dawson*, (1888) 39 Ch. D. 155, followed.

In re Lowman, [1895] 2 Ch. 348, explained and distinguished.

THIS was an appeal from a decision of Kekewich J.

James Hocking by his will dated March 2, 1891, after bequeathing certain annuities to his two sisters, Amelia Ann Hocking, spinster, and Emma Loe, the wife of John Loe, provided as follows:—

Clause 11: " Should my sister Amelia Ann Hocking marry and have children then when the youngest child of Amelia Ann Hocking or Emma Loe whichever shall be the youngest shall reach the full age of 21 years the whole of my estate shall be divided equally between all the children of Amelia Ann Hocking and Emma Loe in equal shares share and share alike."

Clause 12: " Should Amelia Ann Hocking die without being married then when the youngest child of Emma Loe has reached the full age of 21 years my whole estate shall be divided equally between her children share and share alike."

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Clause 13: "My said trustees or trustee may subject to the annuities hereinbefore provided for at his or their discretion raise any part or parts of the then expectant presumptive or then vested share or fortune of any child of the said Emma Loe under the trusts herein contained not exceeding in the whole for any child one third part of his or her then expectant presumptive or vested share or fortune and apply the same for his or her support education advancement or benefit."

The testator died on April 1, 1892.

On February 27, 1896, Miss Hocking married G. O. Benmore, who died in 1897.

At the date of these proceedings Mrs. Benmore was about fifty-four years of age.

The trustees of the will took out a summons to determine (1.) whether, in the event of Mrs. Benmore not having children, the children of Mrs. Loe would be entitled to the testator's residuary estate under clause 12; and (2.) whether the power conferred by clause 13 was now exercisable.

Kekewich J. held, first, that the testator's residuary estate would, in the event of Mrs. Benmore dying without having children, remain undisposed of; secondly, that clause 13 would cease to operate if and when Mrs. Benmore was proved to be past child-bearing. With regard to the second point, the learned judge was of opinion that the children of Mrs. Loe could not properly be said to have an expectant or presumptive share in the testator's estate when it was physically impossible that they could ever enjoy a share in possession. It was objected that the trustees could not be made liable at any time for acting under the clause in question, because it would not be possible for them to determine when, if ever, it became impossible for Mrs. Benmore to have a child; and his Lordship agreed that the trustees could not be held liable if, honestly supposing that the event might yet possibly happen, they made advances under that clause; nor would they be bound to inquire from time to time whether the impossibility of Mrs. Benmore having a child had been reached. He was not, however, prepared to say that they might not be made liable if, knowing that she had attained an advanced age or was on the point of death without issue, they made an advance which could not properly be made under the power. That argument suggested practical difficulties which could be got over in a practical manner; but it ought not to be allowed to affect the proper meaning of the words used in the will. It was then said that evidence to prove that Mrs. Benmore was past child-bearing was not admissible for the purpose of affecting the construction of the will. One answer to that was that, whatever might be the construction of this particular clause, it was only desired to shew that the power thereby conferred had ceased to have any practical operation. But, assuming that distinction to be untenable, the case of *In re Dawson* (1), which had special reference to the law against perpetuities, was inapplicable to cases of a different character in which a high degree of improbability had been treated as tantamount to impossibility for convenience of administration: *In re Lowman.* (2) For the recognised conveniences of administration and the immediate distribution of a portion of the estate, he was entitled to inquire and admit evidence whether a child of Mrs. Benmore could now come into being to disturb the otherwise vested rights of the next of kin; and, that being so, he thought that he was not precluded from admitting like evidence to determine whether the advancement clause was in operation or not. The Court accordingly declared as follows: (1.) "That subject to the payment of the annuities given by the testator's will the testator's estate will in the event of the testator's sister Amelia Ann Benmore dying without children be undisposed of and devolve upon the next of kin of the testator"; (2.) "that clause 13 of the testator's will has no operation if and when the said Amelia Ann Benmore is proved to be past child-bearing."

Mrs. Loe's children appealed against this decision upon both points. The Court of Appeal affirmed the decision upon the first point, but made a formal alteration in the language of the order substituting the words "without having had a child" for the words "without children." This case is reported upon the second point only.

(1) 39 Ch. D. 155.

(2) [1895] 2 Ch. 348.

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Warrington, Q.C., and *R. J. Parker*, for the appellants. The power of advancement continues during the lifetime of Mrs. Benmore. The Court will not construe an instrument by reference to the possibility or otherwise of having children. There is no legal presumption of impossibility of issue at any age in the case of either a man or a woman; and, so long as the legal possibility exists, evidence of physical impossibility is inadmissible. This is not solely a question of administration; it is a question of construing the power. This case, therefore, falls within *In re Dawson* (1), and is distinguishable from *In re Lowman.* (2)

P. O. Lawrence, Q.C., and *Younger*, for the next of kin. The appellants have no presumptive or expectant share under the will in the testator's estate when that estate must eventually devolve upon the next of kin as undisposed of.

Renshaw, Q.C., and *W. H. Cozens-Hardy*, for the trustees.

Parker, in reply.

Cur. adv. vult.

Aug. 11. LINDLEY M.R. (after referring to the will). Kekewich J. has declared that the discretion conferred by clause 13 of this will will have no operation when Mrs. Benmore is proved to be past child-bearing. That is a somewhat novel declaration, and the question is whether it is right. We have come to the conclusion that that declaration must be struck out. Reliance was placed upon *In re Lowman* (2), decided by this Court in 1895. In that case a fund was limited by the testator in the events which happened to the first and other sons of his niece Ellen, with remainder to the first and other sons of his niece Flora. Ellen was seventy years of age and a spinster. Her possible son was the only person who stood in the way of Flora's son. The Court ordered the fund to be paid to Flora's second son, the eldest son having died before he attained a vested interest. That appears to be quite right; but it goes far short of what the learned judge has done here. There the Court deprived no living person of a possible interest. Nor, so far as I am aware, has it ever done so. If property is given to A. in the event of B. having no children, can A. claim that property before the death of B.? My answer is, No, neither at law nor in equity, unless B.'s possible child is the only person who can deprive A. of the property. When that is the case, the Court of Chancery has ordered funds under its control to be paid to A. when satisfied that B., owing to her age, can have no child. Again, if property is given to A. in the event of B. having a child, the Court has never gone the length of saying that A. can be treated in B.'s lifetime as having no interest in the property. The old law as to dower is opposed to any such view. If a woman, however old, marries a tenant in fee or fee tail to which her issue, if any, can succeed, she is entitled to dower, although a woman whose issue, if any, cannot succeed to the property is entitled to none: see Co. Litt. 30 b and 40 a and b, and *In re Dawson.* (1) The woman, however, must be nine years old at the death of her husband (Co. Litt 33 a), which is curious, although it has nothing to do with the question we are now considering. I have looked in vain for any case in which the Court has deprived one person of the chance of becoming entitled to property if another should die childless or have a child. Nor ought the Court to do so. The second declaration should be varied, and instead thereof it should be declared that the discretion of the trustees under clause 13 of the will can be exercised during the life of Mrs. Benmore. The costs will come out of the estate.

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(1) 39 Ch. D. 155.

(2) [1895] 2 Ch. 348.

CHITTY L.J. I am of the same opinion. We have construed this will by the light of clause 11, which was the only one material to the point upon which we are now giving judgment. The children of Mrs. Loe had an interest in the whole of the testator's estate in the event of the testator's sister Amelia—who is now living, and is a widow but has no child—having children. I agree with the law as stated by the Master of the Rolls, and I think that *Jee* v. *Audley* (2), when considered, is an authority for the propositions which he has laid down. It is true that

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(1) 39 Ch. D. 155.

(2) 1 Cox, 324.

Jee v. *Audley* (1) was a case in which the doctrine of perpetuity came into question; but it appears to me to apply to a limitation such as we have now under consideration, and for this simple reason. As is well known, the Court first construes the will, and finds out from the language of the testator what is the true effect of its limitations. In *Jee* v. *Audley* (1) there was a gift on an indefinite failure of the issue of the testator's kinsman John and his wife Elizabeth. John and his wife Elizabeth were both seventy years of age; but Lord Kenyon declined to consider that it was impossible that those two old people could have a child; and, consequently, that being his construction of the will, he applied the measure of the rule against perpetuities. He also said that it would be "a very dangerous experiment, and introductive of the greatest inconvenience to give a latitude to such sort of conjecture"—it is perhaps more than conjecture, but that is the expression which he used. I think that that is good sense, because, if the law had been otherwise than he stated, then, according to the declaration that has been made in the judgment under appeal, it would be the right of a person claiming as the next of kin of the testator to say of any married woman, however young she was, that on medical testimony it was impossible that she could have a child. That sort of thing of course has never been allowed; that is to say, the natural law is not taken into consideration as against the form of the limitation itself; and, if this judgment were right, it would apply also to the case of a man who by medical evidence might be shewn to be incapable of being the father of a child. Therefore it is that I think *Jee* v. *Audley* (1) has a bearing, and a very close one, on the present case. I mentioned in my judgment in *In re Dawson* (2), the case of "Dower" from Coke. I shall not repeat what I then said. Sir Edward Coke puts very briefly, but in his own quaint language, the same proposition. After mentioning that in his time a woman above three-score years old had had a child, he adds, "ideo non definitur in jure," which I then understood, and still understand, to mean that no legal proposition can be founded on the impossibility of issue. That is an old authority, but still it is an authority

(1) 1 Cox, 324.

(2) 39 Ch. D. 163.

in point in the present case. Therefore I think that, so long as the testator's sister Amelia is living, the power contained in clause 13, which relates to expectant and presumptive shares as well as to the then vested—and of course these shares are not vested—is exercisable by the trustees, the clause being not merely for advancement, but for support, education, and benefit.

COLLINS L.J. concurred.

Solicitors: *Field, Roscoe & Co., for Ford, Harris & Ford, Exeter; King, Wigg & Co., for Blight, Callington; Robbins, Billing & Co., for Paige & Grylls, Redruth.*

H. B. H.

JOHN *v.* JOHN.

[1898 J. 985.]

C. A.
1898
NORTH J.
Aug. 4.
C. A.
Aug. 10.

Receiver—Legal Estate—Discretion—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

The Court has now a discretionary power to appoint a receiver whenever it appears to the Court to be just and convenient, and this power may be exercised where the plaintiff is seeking to recover land by a legal title. The discretion must be exercised with a view to all the circumstances of the case. Among other things, it is important to bear in mind the position of the tenants, who, if the defendant is not a person of undoubted solvency and remains in receipt of the rents, may be called upon to pay twice over if the plaintiff succeeds. The Court has also to consider the probability of the plaintiff's succeeding, and the length of the defendant's possession, and whether he has any primâ facie title; and the Legislature must be taken to have contemplated the result that an application for a receiver may practically compel the defendant in an action of ejectment to disclose his title.

Where therefore the plaintiff sought to recover land by a legal title, and the title of the defendant, who was a person of small means, appeared to be shadowy, and the plaintiff's title appeared to be satisfactorily made out, subject to a point on the construction of a will which the Court considered very unlikely to be decided against him:—

Held, by North J. and the Court of Appeal, that a receiver ought to be appointed.

Foxwell v. *Van Grutten*, [1897] 1 Ch. 64, considered.

THIS was an application for a receiver by the plaintiff in an action of ejectment.

George John, by will dated July 28, 1837, devised the estates in question to three devisees and their heirs, to hold to them and their heirs "in trust nevertheless for the use, benefit, and behoof of my eldest son George Dennis John, for and during the term of his natural life; and from and after the death of the said G. D. John and the death of my said dear wife, then in trust to pay the widow of the said G. D. John, if she shall be then living, the sum of 200*l*. per annum which I have already settled upon her; and from and after the death of both my said son G. D. John and his said wife, then it is my will and I do hereby direct that my grandson George Trevelyan John shall have, receive, and take the rents, issues, and profits of my said estates for and during his natural life; and from and after his death, then in trust to and for the use, benefit, and behoof of the eldest son of the said G. Trevelyan John for and during his natural life if lawfully begotten. And in the event of the said G. Trevelyan John leaving no son lawfully begotten, then in trust to and for the use, benefit, and behoof of the next son of my said son George Dennis John, Edward William John, for and during his natural life; and in the event of his dying without leaving any son lawfully begotten, then I give the same last mentioned estates to any other son of my son George Dennis John, his heirs and assigns, for ever. Lastly, all the rest, residue, and remainder of my goods, estates, and effects, both real and personal and of what nature or kind soever not hereinbefore given or disposed of, I give, devise, and bequeath the same and every part thereof unto my dear wife Jane John, her heirs, executors, administrators, and assigns for ever."

The testator made a codicil, dated November 30, 1837, by which he directed that George Dennis John should not take any benefit from the said estates, or the rents or profits thereof, during the lifetime of the testator's wife, Jane John, but that she should hold the same estates and the rents, &c., thereof during her natural life, but no longer, and that the same, from and immediately after her death, should descend to and become the property of his said son, George Dennis John, as he had directed by his will.

The testator made a second codicil dated November 27, 1843, by which he made dispositions of certain other estates, and after reciting the gift of his residuary real and personal estate to his wife, he gave it to his two daughters in case his wife should die before him, which did not happen.

The testator died on October 28, 1847. His widow, Jane John, on his death entered into possession of the above estates, and remained in possession till her death on August 4, 1850.

The testator's eldest son, the above-named George Dennis John, died in 1847 in the testator's lifetime, and his widow died in 1852.

On the death of the testator's widow the said George Trevelyan John entered into possession (subject to the life annuity of 200*l.* to G. D. John's widow), and remained in possession till his death on May 28, 1856. On March 29, 1854, he executed a disentailing assurance of the estates to the use of himself in fee, and on the 31st executed a settlement of them whereby he purported to limit them after his death to the use of his first and other sons successively in tail, with remainder to his daughters as tenant in common in tail, with remainder to his three brothers successively in tail, with divers remainders over.

George Trevelyan John had an only son, George Dennis Trevelyan John, who on his father's death entered into possession, and remained so until his death on January 31, 1898.

On his death his mother, Sarah Ann John, the defendant, entered into possession.

The plaintiff alleged that George Dennis Trevelyan John took nothing but a life estate in the property, and that on his death the property fell into the residue and was disposed of by the will of Jane John. On the supposition that on the death of G. D. Trevelyan John the property passed into the residue, the plaintiff's title to it appeared to be satisfactorily made out under the will of Jane John and the wills of her daughters to whom she devised it.

The plaintiff brought this action against Sarah Ann John claiming—(1.) a declaration of his title; (2) possession of the estates; (3.) mesne rents and profits; (4.) a receiver; (5.) costs, and moved for a receiver. At the time when the motion was made, the will of George Dennis Trevelyan John, by which, as the defendant alleged, he devised the property to her upon trusts and appointed her executrix, had not been proved. She deposed that her son had been in possession for forty-two years, and that she had always believed him to be absolute owner, and she claimed possession under his will. He had made a will dated May 9, 1885, by which he devised these lands to her and two other persons upon trusts, and had appointed the three to be executors, but at the time of the motion for a receiver this will had not been proved.

The plaintiff moved before North J. on August 4, 1898, for a receiver.

Swinfen Eady, *Q.C.*, and *Stock*, for the plaintiff. The interests of justice require that a receiver should be appointed. It is, within the meaning of s. 25, sub-s. 8, of the Judicature Act of 1873, "just and convenient" that the appointment should be made. The present case is like *Berry* v. *Keen* (1) rather than *Foxwell* v. *Van Grutten*. (2)

[NORTH J. referred to *In re Shephard*. (3)]

Hon. E. C. Macnaghten, *Q.C.*, and *T. H. Carson*, for the defendant. The defendant is in possession; she has not to make out her title, the action being for recovery of land. The plaintiff is bound to make out that he has a better title. The Court will not interfere with the defendant's possession. *Foxwell* v. *Van Grutten* (2) is an authority for not appointing a receiver in such a case as the present.

NORTH J. held that if G. D. Trevelyan John had any transmissible estate in the property it must, according to the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, vest in his legal personal representative, and that as none existed, it did not vest in the defendant and her co-trustees, though it would do so on their taking out probate, but until then it remained where the law makes the legal estate go when a man dies intestate, i.e., in the heir-at-law. His Lordship thought there was no reasonable doubt that the plaintiff's construction of George John's will was the correct one, and that he had made out his title satisfactorily, whereas the defendant had nothing to shew but possession founded on a claim which had no foundation. His Lordship therefore considered it to be a case where it was just and convenient that a receiver should be appointed.

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(1) (1882) 51 L. J. (Ch.) 912.
(2) [1897] 1 Ch. 64.
(3) (1889) 43 Ch. D. 131.

W. L. C.

C. A.

The defendant appealed. Before the hearing of the appeal the defendant had proved the will of her son, the two other executors and trustees having disclaimed the real estate and renounced probate. The appeal was heard on August 10, 1898.

Haldane, Q.C., Hon. E. C. Macnaghten, Q.C., and *T. H. Carson*, for the appellant. The leading case on this subject is *Foxwell* v. *Van Grutten.* (1) There is no doubt that now the Court has jurisdiction to grant a receiver on behalf of a legal title, but it will only be exercised where there is vacant possession, or a scramble for the possession, or destructive trespass or fraud. In the present case there is fair doubt on the construction of the will of George John whether George Trevelyan John was not tenant in tail: *Andrew* v. *Andrew* (2); and if he was, the plaintiff's title is defeated by the disentailing assurance.

Swinfen Eady, Q.C., and *Stock*, for the plaintiff.

[LINDLEY M.R. I feel some difficulty owing to *Foxwell* v. *Van Grutten.* (1)]

In that case the plaintiff in one view had no title at all; here the plaintiff's title is satisfactorily made out, subject to the question whether George Trevelyan John took an estate tail, and it can scarcely be argued that he did. The defendant in *Foxwell* v. *Van Grutten* (1) had a primâ facie title; here the defendant manifestly has no title at all. The Court now has only to consider whether it is just and convenient that a receiver should be appointed, and, looking at the whole circumstances of the case, the judge below has exercised his discretion rightly. It is not to be forgotten that the defendant is a person of

(1) [1897] 1 Ch. 64.

(2) (1875) 1 Ch. D. 410, 417.

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limited means, from whom it is not likely that the rents if wrongly received by her can ever be recovered back: in which case the tenants, having paid rents to the wrong person, will be liable to pay them over again.

[They were then stopped by the Court.]

Haldane, Q.C., in reply. If this order for a receiver is upheld, every plaintiff in ejectment will be able to make a defendant shew his title, though the Judicature Act saves his rights. The old law is laid down in *Talbot* v. *Hope Scott* (1), and the Court will not now interfere on behalf of a legal title except in the cases I have mentioned. There is everything here in our favour that there was in favour of the defendant in *Foxwell* v. *Van Grutten.* (2)

LINDLEY M.R. I do not think we shall be introducing any revolutionary practice if we affirm the decision of North J., which I am convinced is right. The only difficulty arises from *Foxwell* v. *Van Grutten* (2), with which we have been very freely, but not unduly, pressed by Mr. Haldane. We have first to look at the Act of Parliament. Sect. 25, sub-s. 8, of the Judicature Act of 1873 says: "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." That enactment evidently applies to what are called ejectment actions; and we therefore have to consider in each particular case whether it is just or convenient that a receiver should be appointed. In considering each particular case we have first to look at the person in possession and consider how long he has been in possession, and whether he claims under any and what title; we must look also at all the other circumstances which may be material, and the risk to which the tenants may be exposed is one not to be lost sight of. Whether that was sufficiently thought of in *Foxwell* v. *Van Grutten* (2) I do not know, but the key to this case to my mind is this: I do not believe in the title of the defendant. I cannot decide on the present proceeding that she has no title, and it may be on the

(1) (1858) 4 K. & J. 96, 113.

(2) [1897] 1 Ch. 64.

hearing I shall be converted, but at present I do not believe in her title. Under those circumstances, believing in the title of the plaintiff and not believing in the title of the defendant, and seeing that the rents are in jeopardy, it appears to me that it would be wrong to refuse a receiver. Those are the short grounds on which I decide this case, and they are quite sufficient in my opinion to justify us in dismissing this appeal.

CHITTY L.J. I am of the same opinion. The jurisdiction conferred on the Court by the 25th section of the Judicature Act of 1873, sub-s. 8, is discretionary, and every judge when he exercises his discretion must exercise it judicially, and must not act arbitrarily or wildly. Sir George Jessel generally read "just or convenient" as "just and convenient," but that is not material to this case. I consider it just and convenient in the circumstances of this case that a receiver should be appointed. What the Legislature by this section has cast upon the Court as its function is to say whether it is "just or convenient" or "just and convenient." I think one element, and one not to be lost sight of in the consideration of a case of this kind, is the position of the tenants. It is true the tenants have not as yet intervened in any way and have not asked for protection; but they clearly would be exposed, and are at this moment exposed, to a double claim. It may be, and probably is, the case that the plaintiff, upon the leases which have been granted by the person last in possession, George Dennis Trevelyan John, has a right to distrain, he having held the property in such a manner that he had by statute a leasing power. However, I pass that by, for I do not go on that ground alone. That is only one of the circumstances. The important point is this. North J. has looked at the will and has arrived at the conclusion that the plaintiff has made out his title, and that the defendant cannot make out any title at all. I do not think it necessary to go so far as that in favour of the plaintiff. There may be some learned argument upon the will which will be worthy of listening to hereafter to shew that the plaintiff's title is barred, but as the case stands my opinion is adverse to the defendant and in favour of the plaintiff, though, as the Master of the Rolls has said, I am liable to be hereafter converted to some other opinion if the ingenuity of counsel be sufficient to shew that the plaintiff's title fails and that the defendant's title is good. Those are the two main circumstances. The other is that the defendant is not in actual possession of any house, or mansion-house, or other part of the property. She will not be turned out of actual possession, and she is a person living in furnished apartments and of small means, so that the rents if paid to her will be in danger of not being recovered from her if judgment at the trial should be given against her. I do not say that this alone would be sufficient, but it is one of the circumstances to be considered. I think the tenants are undergoing risk, and I think the defendant has no primâ facie title.

COLLINS L.J. I am of the same opinion. I was impressed by Mr. Haldane's argument that exercising a discretion in cases of what used to be called ejectment, must involve to some extent an interference with the position of the defendant which is safeguarded by the Judicature Act, inasmuch as he is entitled simply to stand on his possession. There can be no doubt that his special position as distinguished from that of other defendants is recognised and safeguarded by the Judicature Act. It is now, however, the law that the Court has a discretion to appoint a receiver in such cases, and it seems to me I cannot work those two principles together without the one infringing upon the other, and the result of that discretion conferred on the Court is to some extent to interfere with the sacrosanct position which heretofore the defendant in an ejectment action has occupied. Now we have to exercise a discretion, and that discretion must be exercised upon the facts. I agree with what Mr. Haldane says, and I have to admit that exercising the discretion which it is the right of the Court to exercise will practically in many instances compel the defendant to give up to some extent the advantages which he now has, and to disclose that which the Judicature Act has sought to protect him from disclosing, viz., his defence. It would be very difficult for the defendant resisting an application of this kind to keep silence as to his own title. It seems to me that is the logical and inevitable consequence of exercising the discretion which the Judicature Act has given, and which must be exercised on the facts.

Then I come to the question of how we are to exercise the discretion, and I am bound to bear in mind as far as I can the position which the Judicature Act has given to the defendant, and I am also bound to bear in mind all the other circumstances under which the Court has to exercise its discretion; but it seems to me that the essential matter is what view the Court takes as to the probability of the plaintiff's success. We cannot decide the case now because it must be decided at the trial; but we ought not to avoid forming an opinion upon the materials before us, and I think that although the conclusion is not final it is a conclusion upon which we are bound to act. That is the governing factor in the question of discretion. Another element is the position of the tenants. If the defendant is a thoroughly solvent person, so that the plaintiff if he succeeds can and will recover in the shape of mesne profits all that the tenants have paid, that will be one reason for not so seriously considering the difficulty in which the tenants will be placed; but if the defendant is an impecunious person, and if in the opinion of the Court his title is so shadowy as not to give him much hope of success, then it appears to me that the position of the tenants is a very important factor in the exercise of the discretion—a factor which does not seem to have been present to the mind of the Court in *Foxwell* v. *Van Grutten*. (1) It seems to me, therefore, that, having the duty of exercising the discretion, we are bound in the circumstances of this case, having regard to our view as to the probability of the success of the plaintiff, to interfere, or rather to uphold North J. in interfering, for the protection of the tenants and also of the plaintiff.

The plaintiff's costs to be costs in the action.

Solicitors: *Collyer-Bristow, Russell, Hill & Co., for Tyacke, Helston; Coode, Kingdon & Cotton, for Borlase, Milton & Borlase, Penzance.*

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(1) [1897] 1 Ch. 64.

H. C. J.

C. A.
1898
June 27, 28.

BENCE *v.* SHEARMAN.

[1897 B. 1232.]

Debtor and Creditor—Negotiable Instrument—Equitable Assignment of Debt—Notice.

> Notice to a debtor, who has given a negotiable instrument for his debt, that the debt has been assigned by the creditor, can be disregarded by the debtor even if the creditor who has assigned the debt is still the holder of the negotiable instrument.
>
> The decision of Kekewich J. reversed.

APPEAL from Kekewich J.

The defendant Shearman was the owner of a public-house at Manor Park called the Earl of Essex. Being desirous of selling, he employed one Adams to find him a purchaser in consideration of a commission which was originally intended to be 200*l*., but was subsequently reduced to 175*l*. Adams found the plaintiff Bence, and in January, 1897, a contract was entered into between Shearman and Bence for the purchase of the public-house by Bence. Adams was indebted to Bence in sums amounting to 200*l*., and shortly before the time came for completion of the purchase, and the payment of the purchase-money to Shearman, and the commission to Adams, Adams signed and gave to Bence a small piece of paper with a penny stamp upon it, which was dated February 25, 1897, and ran thus: "Received of Mr. Thomas Bence the sum of two hundred pounds (200*l*.) in various sums, and I transfer my commission of 200*l*. to him on the Earl of Essex, Manor Park, in payment thereof." This paper was not signed at the end of it, but across the stamp.

It was common ground that Shearman did not know anything about this piece of paper, or as to any assignment made by Adams to Bence of the commission until March 4, 1897. On that day, which was the day fixed for completion of the purchase, Bence, Shearman, and Adams all met, Bence paid the purchase-money to Shearman, and Shearman gave Adams a cheque for 175*l*. in payment of his commission. There was a conflict of evidence as to what took place upon this occasion.

The case made by the plaintiff Bence was that before Shearman paid Adams his commission he, Bence, shewed the piece of paper dated February 25, 1897, to Shearman, and explained to him that whatever commission was payable by Shearman to Adams had been made over to him, Bence, and ought to be paid to him accordingly; but it did not appear that he ever directed or asked Shearman not to pay Adams. According to Shearman's evidence, Bence never shewed Shearman the paper until after he had given Adams the cheque. Anyhow, Adams received the cheque, and, instead of handing it over to Bence, went away with it. In the view taken by the Court, before the cheque was given Shearman had, at all events, been made aware that Bence had some interest or other in the commission which had to be paid to Adams, but that Bence did not wish to interfere with the regular course of the business, or to prevent the cheque from being made out to Adams or given to him.

Bence's case upon the point was that, as he had shewn Shearman the piece of paper which amounted to an equitable assignment, Shearman ought not to have paid Adams, but Bence. The Court, however, considered it impossible to draw any inference of fact that Bence ever brought to Shearman's mind that he was not to pay Adams, and held upon the evidence that the action could not be sustained on the theory that it was Shearman's duty to pay Bence rather than Adams. After Adams had left, Bence explained the matter more fully to Shearman, shewed him the piece of paper, and persuaded him to stop the cheque, and Shearman, as a matter of fact, gave notice to his bankers to stop payment of the cheque, but on the following morning, March 5, Shearman after a conversation with Adams withdrew this notice.

There was another conflict of evidence upon this part of the case, but, in the view taken by the Court, the cheque was not stopped in consequence of any threat made by Bence to Shearman, but only upon a friendly understanding, without any consideration, in order to help Bence, who had been cheated by Adams, and that there was no obligation upon Shearman either to stop the cheque or to remove the stoppage.

This action was brought by Bence against both Shearman and Adams, and by it the plaintiff claimed a declaration that he was entitled to the commission of 175*l.* on the sale of the public-house as assignee for Adams, and judgment for that amount.

The action was heard by Kekewich J. on February 11, 1898, when his Lordship held that Shearman knew of Bence's interest in Adams's commission before he handed the cheque for it to Adams, and gave judgment against both Shearman and Adams severally for the amount of Bence's debt, with costs.

From this decision Shearman now appealed.

Renshaw, Q.C., and *John Henderson*, for the appellant. All that occurred on the day of completion took place in the presence of Bence. There was no duty, legal obligation, or contract for consideration on Shearman's part either to stop the cheque given to Adams or to remove the stoppage: *Ex parte Richdale.* (1) All that he did he did voluntarily and out of good-nature in order to help Bence. Bence might have prevented the cheque from being given, but did not choose to do so. Once the cheque had been given by Shearman to Adams, Shearman had no power to stop it. Shearman was not in any fiduciary position towards Bence, and had no sufficient notice to make him in any way liable either as a trustee or otherwise: *Lloyd* v. *Banks* (2); *Saffron Walden Second Benefit Building Society* v. *Rayner*. (3)

Warrington, Q.C., and *Beddall*, for the respondent Bence. Shearman had notice of Bence's rights before he handed over the cheque to Adams, and indisputably at the time he stopped payment of it. At that time, at all events, he was trustee for Bence. It was his duty not to pay the money to Adams, and he had the power and the opportunity to prevent the wrongful receipt of the money. He was not justified in removing the stoppage, and so depriving himself of the power of obtaining repossession of the amount, and handing it over to the proper owner. In the result, having paid the wrong person, he is liable to the right person, i.e., the respondent. By the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 75, sub-s. 1, "The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by countermand of payment"; and but for the withdrawal of the countermand Adams could not have got the money. And if Adams had endeavoured to enforce payment of the cheque obtained from Shearman under such circumstances, it was Shearman's business and duty to resist the proceedings in the interest of Bence, whom he knew to be the rightful owner of the money. The view taken by the learned judge is the right one, and his decision ought to be upheld.

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(1) (1882) 19 Ch. D. 409.

(2) (1868) L. R. 3 Ch. 488, 490.

(3) (1880) 14 Ch. D. 406.

John Henderson, in reply.

LINDLEY M.R., after dealing with the evidence, and, as above stated, coming to the conclusion that the action could not be sustained upon the theory that it was Shearman's duty to pay the plaintiff rather than Adams, or upon that of an obligation upon Shearman either to stop the cheque or remove the stoppage, continued :—That brings me to the last point, which is of very great importance, not only to these parties, but also to business people generally. Counsel for the respondent have contended that, after Shearman had given Adams this cheque and Adams had got it, in consequence of the notice thus given by Bence to Shearman of what had taken place, it was Shearman's duty not to pay the cheque, and it was his business to take proceedings against Adams so as to resist any action on the cheque.

That appears to me to be a very startling proposition, to which I am not disposed to accede unless I am obliged. Let us work it out. A man gives a creditor a cheque or promissory note for his debt. The person who gives the note or the cheque is then informed that the debt was assigned before the note was given. The creditor still holds the note. That is the state of things. Is the debtor under any obligation not to pay it? It appears to me that he is not. The contrary involves this—

that if you have a person who is indebted on any account, and whose creditor holds a negotiable instrument, the consideration for that instrument can be assigned in such a way that the person who is the debtor is not to pay the holder of the negotiable instrument. I am not prepared to accede to that. In my opinion the law is just the reverse.

So far as I can discover (and I am speaking now with reference to principle, for I am not aware of any authority) the true principle is this—that notice to a debtor who has given a negotiable instrument in payment of his debt that the debt has been assigned can be disregarded by the debtor. In other words, where the consideration of a promissory note or cheque is assigned, to give a man notice that the consideration has been assigned, is to try to put on him obligations which the law does not recognise. To hold the contrary would be commercially disastrous. The very ingenious contention by counsel if well founded would no doubt much assist him, but in my opinion it is quite contrary to all principle; and I take the earliest opportunity of protesting against it.

The appeal will be allowed, and there will be judgment for the defendant Shearman with costs both here and below.

CHITTY L.J. The plaintiff is the equitable assignee of a debt which Shearman owed to Adams. That assignment is contained in a little piece of paper which the Master of the Rolls has referred to. It is rather an obscure document, but from it we can make out that it does amount to an assignment. An ordinary man of business might, no doubt, have some difficulty in understanding it. Shearman has given the cheque to Adams, and it has been paid; and the plaintiff's claim against Shearman is that that is a wrongful payment against him, and that he is entitled to recover over again against Shearman the sum of money he has paid—in other words, that Shearman has rendered himself liable to pay twice.

I shall not go through the facts again. I merely call attention to the date of the assignment, which is February 25. The time for the completion of the change (of ownership), as it is called, was March 4. The plaintiff gave no written notice, or

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any notice, as is admitted, to Shearman until, if ever, the cheque was drawn and handed over. The plaintiff's view, according to the evidence, was that the transaction would be carried out in this way—that he should have notice when the change should take place, and that he should be present when Shearman was paying the commission to Adams. I am satisfied, on the evidence, that no notice of an equitable assignment sufficient to bind Shearman was given previous to the handing over of the cheque.

The law is quite clear on the subject. It is to be found in Lord Cairns' judgment in *Lloyd* v. *Banks.* (1) There must be clear and distinct notice from the incumbrancer—in this case the equitable assignee—and the mind of the trustee must be brought in some way "to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it" accordingly. Taking that, which is an excellent statement of the law on the subject, and applying it to this case, I am of opinion that there was no such notice given by the plaintiff to Shearman before the handing over of the cheque. Indeed, I am satisfied it was not the plaintiff's intention that the transaction should be carried out in any such way as by a direct payment by Shearman, the debtor to Adams, to him, Bence, the equitable assign of Adams. I should add to this that there was nothing like a distinct notice from Bence to Shearman that he was not to pay Adams. As I have already explained, Bence intended to get the money from Adams; and I accept the argument of counsel for the respondent in this respect, that, upon that cheque being handed over to Adams, Adams became the trustee of the cheque, and of the money for Bence.

Then it is said, and this is the ingenious argument put forward by Mr. Warrington and supported by Mr. Beddall, that notice, after the cheque had thus been delivered, that the consideration for the cheque, not the cheque itself, had been assigned to Bence, was sufficient to impose some obligation on

(1) L. R. 3 Ch. 488, 490.

Shearman. It appears to me, first, that there is no authority for any such proposition; and, secondly, that the principle upon which the law affecting the debtor whose debt has been assigned is founded is contrary to it. It was pointed out long ago by Lord Cranworth in *Jones* v. *Farrell* (1), in consequence of an observation of Knight Bruce L.J., that there would be great embarrassment created by carrying the doctrine of equitable assignment of a debt to an unreasonable length. He says: "It was observed by the Lord Justice Knight Bruce, during the course of the argument, and it has often occurred to me, that the doctrine of this Court as to equitable assignments, if we look at it merely as theorists, may lead to very great inconvenience. Nobody can be wholly free from debts. The most solvent person in the world owes debts; he may owe something to a tailor, or a butcher, or a baker, and it would be very inconvenient to him to be told unexpectedly by one of these tradesmen, 'I have assigned over to A. B. the 25*l*. which you owe me as the amount of my bill.'" I read that for the purpose of supporting the reasoning upon which I am relying, which is that this doctrine of equitable assignment is not to be carried to such an extent as to embarrass ordinary men in the course of business. As soon as Shearman, according to the intention of Bence, had handed over that cheque to Adams, it appears to me that Shearman had nothing more to do with it. It is said he was under some obligation; but it must be remembered, in reference to these equitable assignments, that the person who is said in equity to be a trustee for the equitable assignee is not constituted a trustee with his own consent. It is the equitable doctrine applied to him which turns him into a trustee. I do not see any reason for making that trusteeship thus imposed on him by law more burdensome than it already is.

In this case Shearman did, upon the request of Bence, give notice to the bank stopping the cheque. If the plaintiff had relied on, or proved that there was, an enforceable promise on the part of Shearman to give this notice and to delay, through countermand to the bank, the payment of the note for such a reasonable time as would have enabled Bence to take proceedings for the purpose of recovering the money, that would have been another case; but it is plain, first, that no such promise is set up in the pleadings, and, secondly, that no such promise was proved—that is to say, no promise on which an action could be brought—no consideration given for it in the way of refraining from taking steps. In fact, I think one may throw out of view altogether the suggestion that there was any promise which affected Shearman. So that Shearman stands in the position of being liable, if at all, in respect of this cheque on the footing that he was constituted a trustee of this consideration—that he was constituted a trustee by getting notice after he had rendered himself personally liable on the cheque to Adams. That is a most ingenious argument, and striking for its novelty; but equally, in my opinion, striking for its unsoundness. I do not care to pursue the question whether Shearman could have defended an action brought against him if he had continued the stoppage, because it appears to me Shearman was under no obligation to put himself in this position of embarrassment. After he had once handed over the cheque in the presence of Bence, it appears to me he was free of the matter; and I dissent altogether from the argument that a notice given after the delivery of a negotiable instrument, in such circumstances as these, constitutes the original debtor a trustee, or imposes on him any obligation which can be properly deduced out of the true consideration of the equitable principles relating to the matter.

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(1) (1857) 1 De G. & J. 208, 218.

If, then, there never was a duty (and in my opinion there was not) on the part of Shearman to stop the cheque, all that Shearman did was a voluntary courtesy on his part; and I think the argument of counsel that what happened afterwards, the countermanding or withdrawal of the stoppage, amounted to the giving of a new cheque, cannot for a moment be sustained. The courtesy was because Bence had a ground of complaint against Adams, and a very serious one, which Shearman, as a reasonable man, could take into consideration and in respect of which he could say, as he did say, "I will do you this service of stopping the cheque until I have seen

Adams." I know there is evidence that the promise went further than that; but, as I have already disposed of all questions of liability on the promise, it seems to me, as it does to the Master of the Rolls, that it is quite immaterial whether Shearman said he would stop it till he had seen Bence, or whether he said he would stop it till he had seen Adams.

To sum up my opinion, it is this—that Shearman is under no liability; he has not been converted into a trustee by the subsequent acts; he had brought himself under the obligation to Adams by giving him the cheque before he had any notice; and I add to what I have said an observation of Sir George Jessel's in *Ex parte Richdale* (1), which is in these words: "I never heard of any obligation on the part of the drawer of a cheque given for value to stop the payment of it for the benefit of a third party." The third party in this case was Bence, who was not the cestui que trust of Shearman.

COLLINS L.J. I am of the same opinion, and but for the fact that we are differing from the learned judge below I should not add anything.

It seems to me that there is one point only in this case, and that is whether notice of the fact of the assignment by Adams to Bence was brought home to Shearman before he gave the cheque to Adams. I do not mean merely a document shewn to him or observations made about it, but whether in the opinion of a jury it could be said that the information that the debt had been assigned so as to be no longer due to Adams but due to Bence was fairly brought home to the mind of Shearman. Otherwise he was justified in paying Adams and not Bence. On that part of the case I should have felt embarrassed, as it is a pure question of fact and the learned judge below saw the witnesses, if he had rested his opinion on a finding of that fact. The learned judge has not found that fact, though he says the inclination of his judgment was that notice was given, and I cannot but think he would have based his judgment on it had he been clear about it. The evidence, it seems to me, does not warrant that finding. In

(1) 19 Ch. D. 416.

fact, Mr. Warrington in his very able argument entirely gave up that point; for his view was that the real intention of the parties was completely carried out when Shearman handed the cheque to Adams; and it is quite clear that that may have been so, because it was Shearman's object to get a discharge from Adams, to whom, unless he had distinct notice of assignment, he was undoubtedly a debtor. Bence appears to have thought he would be safeguarded if he were present and saw the transaction carried out, and there is evidence on his own admission that he was desirous it should be carried out in that form, because he did not wish to interfere with the ordinary course of payment by a cheque. Therefore what he intended to do is really what was done on the occasion. On that, which appears to me to be the real point in controversy, I think the learned judge is wrong, and that Bence acquired no right against Shearman.

But another point was taken, which I think was the basis of the learned judge's judgment, and that is that the cheque having been properly handed by Shearman to his creditor, Adams, in discharge of his legal obligation, and being properly handed inasmuch as he had no notice of any trust or equity in any other person, that after he has come under a legal obligation upon that cheque, which in legal parlance is payment, he nevertheless made himself in some way liable to Bence, because being asked and assenting he stopped the cheque in order that inquiry might be made. He has thus, it is said, come under an obligation not to pay the cheque to the legal owner of the cheque, but to another person, who now, for the first time, apprises him that the consideration for the debt has been assigned to him. That from the common law standpoint is a most startling proposition, and I am very glad to find on the great authority of my learned brothers that in their view equity has never been carried to such lengths as that. Here is a person who, in conformity with a legal obligation which he could not dispute, gives a cheque for a debt to Adams. Being liable to an action by Adams or his transferee on the cheque, he is asked as a matter of kindness to stop the cheque. He was under no sort of obligation to do so and might have refused,

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but as a matter of indulgence he does it. He incurs a risk thereby: the cheque might have been in the hands of the original donee or transferred to somebody else. But, having as a matter of courtesy stopped the cheque, what obligation is he under? He is told then for the first time that the debt in respect of which his cheque was given had been assigned. How does that constitute him a trustee? In the meantime, before he learns this, he has given the cheque and become liable on it; and it seems to me that it is an attempt to create a trust by giving notice after payment, and an attempt to put the assignee in as good a position as though he had given notice before payment. It is too late then to begin to try and alter the relation of the parties. The party who gets the notice has come under a legal obligation which may result in an action being brought against him. He must be prepared, if he does not pay the cheque, to have an action brought against him. Surely he cannot be compelled to take up such a position. It seems to me, therefore, that, having given a cheque on which he is legally liable, his obligation to deal with the holder of the cheque is not altered by notice, after he has given the cheque, that the debt was assigned.

For these reasons I agree that the judgment of Kekewich J. must be reversed.

Solicitors: *Loxley, Elam & Gardner; J. R. Pakeman.*

W. W. K.

In re GRINDEY.
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KEKEWICH J.
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Aug. 2.

Trustee—Executor—Breach of Trust—Outstanding Estate—Debt secured by Promissory Note—Loss to Estate—Liability—Relief—Acting "honestly and reasonably"—Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 3 *sub-s.* 1.

A testator by his will gave his real and personal estate to his executors and trustees upon trust to maintain the same in the like mode of investment as at his death until one of his sons should attain the age of twenty-four. The estate comprised a debt of 166*l.* due upon a promissory note payable upon demand; the executors, believing the debtor to be a man of good credit, neither called in, nor applied to the Court for directions as to this debt; the debtor died insolvent eighteen months after the testator; and the estate suffered a loss:—

Held, that, having regard to the terms of the will and the amount of the debt, the executors might reasonably have thought they were not bound either to call in the debt or to apply for directions, and that, under the circumstances, having acted honestly and reasonably, they ought to be relieved, under s. 3 of the Judicial Trustees Act, 1896, from their breach of trust and from personal liability for the same.

The decision of Kekewich J. affirmed.

APPEAL from Kekewich J.

Sampson Grindey, of the Holme Farm, Clifton, in the county of Derby, farmer, by his will dated April 9, 1892, appointed his sons, Isaac Grindey and Sampson Grindey, and one R. J. Templeman, to be trustees and executors thereof, and gave to them all his "real and personal estate whatsoever and wheresoever hereinafter called my trust estate, upon trust to maintain the same and every part thereof in the like mode of investment as the same shall be at my decease until my said son Sampson Grindey shall attain the age of twenty-four years"; and for this purpose he empowered his trustees to carry on his farming and grazing business in the same manner as it had been hitherto carried on by him, and to employ in the said business any portion of his said trust estate as they might deem necessary, and without any liability for any loss which they might sustain in doing so; and to permit his wife and his said son

Sampson Grindey to manage his said businesses and to have the use and enjoyment of all the stock and effects on the said farm; and he directed his trustees to employ such portion of the income of his trust estate in or towards the maintenance of his wife, his said son Sampson, and any other of his unmarried children who should be residing with them, as his trustees in their discretion should think fit; and when and so soon as his said son Sampson Grindey should have attained the age of twenty-four years, the said testator directed his said trustees to stand possessed of the whole of his trust estate: as to the stock and effects upon his said farm, upon trust for Sampson Grindey absolutely; as to a certain messuage at Ashbourne, certain shares, and a sum of money therein mentioned, upon trusts for the benefit of the said testator's wife during her widowhood, and after her death or second marriage, upon trust to sell the messuage and sell and convert the shares and sum of money, and hold the same upon the trusts thereinafter declared; and, after certain other provisions, as to the residue of his real and personal estate, upon trust to make a payment thereout to his daughter, and to pay and divide the balance between all his children, except Isaac Grindey, living at his decease equally, share and share alike.

The will contained a power of investment embracing, in addition to government or real securities and stocks or the securities of any railway or other company incorporated by Act of Parliament and paying a dividend on its ordinary shares, any security whether public or local authorized by Act of Parliament, and any stocks, shares, or securities of any railway company in the United States of America, as his trustees in their or his uncontrolled discretion might think desirable. And the testator authorized his trustees and executors "to postpone as long as they or he in their or his discretion shall think fit the sale or conversion of my real and personal estate, or any part thereof respectively." The will contained no specific direction as to the calling in of debts due to the testator.

The testator died on September 23, 1892 (at which time Sampson Grindey was twenty-one years and three months old), and his will was proved by all the executors on November 25,

1892. In addition to certain real estate, the testator left personal estate of the value of 2000*l.* or thereabouts. Two of the executors, namely, Isaac and Sampson Grindey, were farmers, and the third, R. J. Templeman, was the manager of a bank.

Part of the testator's estate consisted of a debt of 166*l.* due from one Thomas Fernyhough upon a promissory note payable on demand. This note was dated May 15, 1890, and was expressed to bear interest at the rate of 5 per cent. per annum; and the interest was duly paid to the testator down to the time of his death in May, 1892. Fernyhough was the agent for the owners of the farm of which the testator and his two sons Sampson and Isaac were the tenants or occupiers. At the time of the testator's death Fernyhough was a person in good credit, and in a highly respectable position; and he continued in good credit until his death, which took place in May, 1894. Meanwhile the executors did not demand or receive payment either of the interest on or the principal secured by the promissory note, but allowed it to remain outstanding, Fernyhough having proposed to continue paying interest at 5 per cent. After Fernyhough's death it was discovered that he was not in solvent circumstances, and had been in financial difficulties before the death of the testator; and his estate when realized only paid a dividend of 2*s.* 6*d.* in the pound.

Sampson Grindey attained twenty-four in June, 1895. It appeared that R. J. Templeman had been desirous of calling in the 166*l.* secured by the promissory note, but that the other two executors were unwilling to do so, believing Fernyhough to be in a sound financial position, and that therefore the continuance of the loan was a good investment; and they had given Templeman an indemnity against any loss which might arise from not calling in the debt.

This was an action by two married daughters of the testator against the three executors, claiming (inter alia) a declaration that the defendants had been guilty of a breach of trust in leaving outstanding the 166*l.* that was owing to the testator's estate, and that they might be ordered to render an account, and bring into account the full amount owing upon the promissory note with interest, and to make good to the estate the amount thereof.

The defence was that the defendants had refrained from calling in the promissory note in order to obtain the high rate of interest from a person whom they considered perfectly solvent; that they had acted honestly and reasonably in not requiring the payment of the money; and that inasmuch as Fernyhough had turned out to have been insolvent at the time of the testator's death, they could not have obtained payment of the promissory note even if they had called it up.

The action came on for hearing before Kekewich J. on January 27, 1898.

Warrington, Q.C., and *J. M. Stone*, for the plaintiffs, cited s. 3, sub-s. 1, of the Judicial Trustees Act, 1896, *In re Brogden* (1), and *In re Chapman.* (2)

Renshaw, Q.C., and *Ingle Joyce*, for the defendants.

KEKEWICH J., after stating the facts, held that what the trustees did in their character of executors was within s. 3, sub-s. 1, of the Judicial Trustees Act, 1896. His Lordship was also of opinion that, with regard to their relations with Fernyhough, there was nothing to shew they did not act honestly: that when Fernyhough proposed to pay them interest at 5 per cent. on the debt of 166*l.* due on the promissory note, they believed that they would receive that interest, and would not get such a high rate of interest elsewhere, and that that was the ground on which they acted.

On the whole, his Lordship held that the trustees were bound to render an account, and were chargeable with such sums as without their wilful neglect and default they might have received, but that this would apply only to the interest on the 166*l.*

G. I. F. C.

C. A. The plaintiffs appealed. The appeal was heard on August 2, 1898.

Warrington, Q.C., and *J. M. Stone*, for the appellants. At the time of the testator's death the defendants believed, as

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(1) (1888) 38 Ch. D. 546.

(2) [1896] 2 Ch. 763.

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they say, that Fernyhough was solvent, and it was their duty to call in this debt within twelve months after the testator's death. They never called it in at all. It was still outstanding at the death of the debtor, and the testator's estate has suffered loss which they are bound to make good. The only defence open to them would be the belief that no proceedings would have led to any result. And this they cannot allege. The debtor was in good credit, and if pressed would have found the money. The relief given by s. 3 of the Judicial Trustees Act, 1896, applies only in cases where the course taken by the trustees is one which the Court would have sanctioned upon an application made for directions; and it is impossible to suppose that any judge would have sanctioned the leaving of this asset outstanding. The trustees have not acted "honestly and reasonably" within the language of s. 3. It was for reasons of their own, and in order to keep on good terms with the landlord's agent, that they refrained from demanding payment. They ought to have pressed for payment and have enforced it if not made within a reasonable time, especially having regard to the terms of the trust: *In re Brogden.* (1) They never applied for directions. The power to postpone the conversion of the real and personal estate does not avail them, because that only applies to property in a proper state of investment; and upon the true construction of the will this was not an investment at all. In a case like this the onus lies upon the executors of proving that they have acted honestly and reasonably; and they have not discharged that burden: *In re Stuart.* (2)

Renshaw, Q.C., and *Ingle Joyce*, for the respondents. The first trust of the real and personal estate given to the trustees was "to maintain the same and every part thereof in the like mode of investment" as at the testator's death. These are very wide words, and apply to the part of the personal estate which was secured by this promissory note. There has, therefore, been no breach of trust on the part of the executors. But if there has been any breach of trust, they are entitled to the protection given by s. 3, for it cannot be called unreasonable

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(1) 38 Ch. D. 546.

(2) [1897] 2 Ch. 583.

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that the trustees should have thought it within the discretion given to them by the terms of the will to retain this money in this mode of investment. A loan on security like this is in common parlance an investment, though not perhaps an authorized one. The testator himself had allowed the note to run for a considerable time, though it was payable on demand; and the will proceeds on the footing of not realizing anything until the period of division except for the payment of debts. The burden of proof is no doubt on the executors, but they have discharged it.

Warrington, Q.C., in reply.

LINDLEY M.R. This case is not altogether free from difficulty, but I think the conclusion at which the learned judge arrived is the right one; although I am not prepared to give the same reasons as he did. I start, first, with the Act of Parliament, the Judicial Trustees Act, 1896. Sect. 3 was put into the Act for the benefit and protection of trustees who have committed breaches of trust, but have acted honestly and reasonably; and it runs thus: "If it appears to the Court that a trustee . . . . is or may be personally liable for any breach of trust." The words "or may be" appear to me to point to doubtful questions of construction. The section goes on: "whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act,"—those words are immaterial in this case—"but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same."

The facts of this case are simple enough. The testator died on September 23, 1892, and amongst his assets was a promissory note signed by one Fernyhough for 166*l.*, bearing interest at 5 per cent. Interest on that note had been paid to the testator during his life. When the testator died, Fernyhough was supposed to be a person in good credit, and well able to pay the 166*l.* when called upon. It was not called up within twelve months after the death of the testator, nor, indeed, at all; but before many more months had expired, namely, in May, 1894, Mr. Fernyhough died; and then it was found that he was not in a solvent position; and the money has been, to a considerable extent, lost. Under those circumstances, the persons beneficially interested in the estate of the testator say that the trustees must make good this loss; that they ought to have called in the debt within twelve months after the testator's death, and not having done so are responsible for the loss to the estate. That might have been their position but for the Judicial Trustees Act of 1896. The trustees had a curiously framed will to guide them, and their duty was to carry out the trusts of it. When I look at the will, I cannot say that a reasonable business man would have been to blame if he had thought that it was no part of his duty to call in this promissory note until one of the legatees, Sampson Grindey, attained the age of twenty-four. Any business man reading this will might fairly come to the conclusion that it was not the intention of the testator that this promissory note should be called in. If that was a reasonable view to take, then, whether it was absolutely right or absolutely wrong, in my opinion the 3rd section of this Act does apply, and this is a case in which the Court can relieve the trustees from liability. The sum of 166*l.* is too small to make it incumbent on us to say that it was right and proper to ask the Court for directions with regard to it. It would have cost a considerable proportion of the sum itself. It is not like a case in which a large amount is at stake, where it would be unreasonable to leave it outstanding without the direction of the Court. With a small amount like this, it was reasonable to save the expense of a summons before a judge to obtain the interpretation of a will like this.

The will is peculiar. There is no specific direction to get in debts or anything else; but there is this curious clause in it. After appointing his sons Isaac and Sampson and R. J. Templeman trustees and executors of his will, the testator goes on: "I give devise and bequeath to them all my real and personal estate whatsoever and wheresoever hereafter called my trust estate upon trust to maintain the same and every part thereof in the like mode of investment as the same shall be at my decease until my son Sampson Grindey shall attain the age of twenty-four years." Then he goes on to say later what is to be done when Sampson Grindey does attain twenty-four. Among the testator's assets were shares in a limited company, and these, as appears later in the will, were obviously not to be got in. That appears from the disposition made of them afterwards. What does the testator mean by "maintain the same and every part thereof in the like mode of investment as the same shall be at my decease"? How is that to be applied to those parts of his assets which were not invested in any proper sense of the word? The clause shews that he was using the expression "in the like mode of investment" in a very loose sense; and it is difficult to ascertain the precise sense. I am not at all prepared to say that the testator did not look upon the money due upon this promissory note as money invested. He had lent it to a man in good credit, and got a promissory note bearing 5 per cent. interest. If we had to make up our minds on the true construction of the will, there would be considerable difficulty about it; but we are not, I think, called upon to decide the question of construction. The only question we have to decide is whether these trustees ought as reasonable men to have known, or to have seen from this will, that it was their duty to get in this promissory note. I do not think we can say that. Having regard to the loose language of this will, they might reasonably have thought they were at liberty to leave this 166*l.* alone, and it was no part of their duty to spend money in applying to the Court for directions as to what ought to be done with so small a sum as this.

I think therefore that, upon the combined effect of the will and the Act of Parliament, the decision of Kekewich J. was right, and that the trustees ought to be relieved from liability for the loss of this money. They never expected to lose it: they thought it was safe and that they were at liberty to leave it where it was; and they acted honestly and reasonably. The appeal must be dismissed with costs.

CHITTY L.J. I am of the same opinion. The section is not easy to construe; but in my opinion, a narrow construction ought not to be put upon it, having regard to the language used and the general object in view, which is plain, namely, the relief of honest trustees who have acted reasonably. "Reasonably" must mean reasonably as trustees.

In this particular case the testator made a will in which he gave no specific direction to his executors to call in the debts that were owing to him. He was carrying on a farming and grazing business, and had book debts and money on deposit at his bankers. That was a condition of things with regard to debts that would exist, and would probably be contemplated by a man in his position of life. The promissory note was, having regard to his property, for a comparatively small sum of money; and it had, I think, been treated by him in his lifetime as an investment; because he had received the interest upon it for two years, which was a longer period than that during which the trustees retained the note in respect of which they are charged with a breach of trust, because it was eighteen months after the testator's death that the catastrophe occurred.

In my experience, there is no source of trouble from which trustees have become more frequently entangled in breaches of trust than obscure wills; and in dealing with this section we may take into consideration the nature of the will itself, and the difficulty in which it placed the trustees. There is certainly on this will a possible construction which might reasonably be entertained by ordinary business men. I will not say men in the position of farmers, because it is not suggested that the Act is made to apply to any particular set of trustees, or to their special knowledge of business or their special qualifications. That might be dangerous; but, reading the opening sentence of the will, I think an ordinary business man might reasonably say that, having regard to the course the testator himself had pursued with reference to this promissory note, this was intended to be part of the estate which was to be retained in the same state as it was at the time of his decease, until, of course, it was necessary to get the money in hand for the purpose of division among the beneficiaries. Therefore, when

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I come to the question of the Act and have to consider the words "acted honestly and reasonably," the Court is justified in taking these circumstances into consideration in ascertaining whether the trustee has or has not acted reasonably. There being this question of the interpretation of the will—a question on which it is unnecessary for the Court itself to pronounce a final opinion—I think the trustees were acting reasonably in treating this as a sum that had been invested by the testator, although merely upon a personal promissory note bearing interest, which interest was to be applied as part of the income of the trust estate.

Then that being so, I turn back for a moment to the question of honesty. It was argued that the executors had not acted honestly because they were actuated by motives arising from their own interest. The debtor on the promissory note was the agent of the farms held by the testator and two of the executors; but it would be straining the matter unduly against the executors to say they were acting from any sinister motive or to indulge the debtor to the estate. It was to the advantage of the estate that the farms the testator directed to be continued and managed by his widow, for the benefit of herself and children, should be held through the agency of a man who would be well disposed towards them. Without pursuing that further, I am quite satisfied that these trustees acted honestly in the matter.

Then it is said they might have obtained the direction of the Court whether they should, or should not, call in this small sum of 166*l.* The practice at the present day, no doubt, enables trustees to apply to the Court for its directions and opinion at an expense which, when contrasted with that occasioned by the old method of filing a bill and administering the whole estate, is comparatively small; but at the same time, however anxious the judges may be to keep down the expense of an originating summons, it is quite plain that something like 50*l.* or so would have to be expended in a case of this kind, which would involve a consideration of the position of the debtor and other matters. I cannot say that in declining to put the trust estate to this expense in regard to this small

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matter the trustees were not acting from a proper motive. The difference of income is not large: 5 per cent. was the interest on the note, and it would have been 3 per cent. or so if the money had been called in. The result is, that I think the trustees, having acted honestly and reasonably, ought fairly to be excused from the breach of trust, and from omitting to obtain the direction of the Court in this particular matter. On these grounds I think the judgment of Kekewich J. ought to be upheld, and the appeal dismissed with costs.

COLLINS L.J. I am of the same opinion, and have nothing to add.

Solicitors: *G. F. Hudson, Matthews & Co., for J. Bamford, Son & Wilson, Ashbourne; Rowcliffes, Rawle & Co., for Holland & Rigby, Ashbourne.*

W. W. K.

SOUTHWARK AND VAUXHALL WATER COMPANY *v.* WANDSWORTH DISTRICT BOARD OF WORKS.

[1898 S. 2354.]

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July 27, 28; *Aug.* 8.

Highway Authority—Exercise of Powers—Lowering Surface of Street—Mains and Pipes of Water Company thereunder—Powers and Duties of Highway Authority—Metropolis Management Act, 1855 (18 & 19 *Vict.* c. 120), s. 98—*Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict.* c. 34), s. 61.

A water company in exercise of statutory powers laid down pipes under the surface of a street, and the highway authority of the district afterwards, in exercise of the power in that behalf given by s. 98 of the Metropolis Management Act, 1855, proposed to lower the surface of the street, and to do so without altering or disturbing the position of the pipes, but so as to leave only a few inches of soil over them.

In an action by the water company to restrain the highway authority from lowering the surface of the street without at the same time lowering the pipes of the company to a corresponding depth under the new surface:—

Held, that the 98th section of the Act of 1855 did not impose upon the highway authority, when exercising the power thereby given to them of altering the level of a street, any express or implied duty to exercise also at their own expense the power by the same section given of altering the position of the pipes thereunder, for the benefit of the water company, in a case where the highway authority did not require for their own purposes to interfere with such pipes.

The decision of Kekewich J. reversed.

Gas Light and Coke Co. v. *Vestry of St. Mary Abbotts*, (1885) 15 Q. B. D. 1, distinguished; *Geddis* v. *Bann Reservoir Proprietors*, (1878) 3 App. Cas. 430, distinguished and explained.

APPEAL from Kekewich J.

This action came before Kekewich J. upon a motion by the plaintiffs for an interlocutory injunction to restrain the defendants from lowering the surface of certain streets and footways in their district under which the pipes and mains of the plaintiffs were laid, in any manner which would leave such pipes and mains without a sufficient covering of soil or other material to protect them from injury, whether by the passing of traffic, the effect of frost, or otherwise, unless the defendants should first alter the position of the said pipes and mains by placing them at a depth below the proposed new surface of such streets or footways, not being less than the depth at which the same were below the then present surface of such streets or footways.

The plaintiffs had laid their pipes and mains under the streets and footways in question at depths in some places varying from 1 ft. 10 in. to 1 ft. 4 in., and the defendants, in course of certain improvements they were making within that district, contemplated lowering the surface of these streets and footways in such a manner that, although the plaintiffs' pipes and mains would not be touched, and their position would neither be altered nor disturbed, the depth of the soil above them would be reduced to a few inches only, so that in one place these pipes or mains would only be 3 inches, and in another only 2 inches, below the new surface. The defendants were acting under the powers conferred upon them by s. 98 of the Metropolis Management Act, 1855, which enacts as follows: "It shall be lawful for every vestry and district board from time to time to cause all or any of the streets within their parish or district, or any part thereof respectively, to be paved or repaired when and as often and in such form and manner and with such materials as such vestry or board think fit, and to cause the ground or soil thereof to be raised or lowered, and

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the course of the channels running in, into, or through the same to be turned or altered, in such manner as they think proper, and to alter the position of any mains or pipes in or under such street, such alteration to be made subject to the approval of the engineer of the company to which such mains or pipes belong."

The plaintiffs' case was that, if the surface of the streets and footways in question was lowered in the proposed manner, their pipes and mains would be exposed to the action of frost, and the water in them would be in danger of being frozen during a portion of their length; but the defendants maintained that they were acting within their rights, and that if the plaintiffs' pipes and mains, for their protection from frost or otherwise, now required lowering, the plaintiffs, who had not in the first instance placed them at a proper depth, must lower them at their own expense.

The motion came before Kekewich J. on July 8, 1898, when his Lordship made an order granting an interlocutory injunction to restrain the defendants from lowering the surface of the streets and footways in their district whereunder the pipes and mains of the plaintiffs were laid in any manner which would leave such pipes and mains without a sufficient covering of soil or other material to protect them from injury by frost or otherwise, without first altering the position of the said pipes and mains by placing them at such depth below the proposed new surface of such streets or footways as would not expose them to greater danger from frost or otherwise than they were at present.

The defendants now appealed from this order, and by consent the appeal motion was treated as an appeal from a final judgment in the action.

Renshaw, Q.C., and *Lyttelton Chubb*, in support of the appeal. The appellants, as the responsible highway authority, are empowered by the 98th section of the Metropolis Management Act of 1855, for the benefit of the public using their highways, to raise or lower the surface of any of the streets within their district in such manner as they may think proper.

In the lawful exercise of this power they propose to lower the surface of some of their streets in a proper manner. It happens that a trading company have laid water-pipes under these streets, but the appellants do not intend to touch or disturb these pipes. They are guilty of no negligence; they have done no damage to the company. The company, knowing that this power of lowering the surface existed and might at any time be exercised, chose to take the risk of laying down their pipes at an insufficient depth under a footway with an irregular surface which would probably have to be altered, and, although the position of those pipes may now require alteration for their proper protection, the respondents cannot shew that there is any duty either express or implied on the part of the appellants to lower the pipes at their own expense: *Boulton* v. *Crowther* (1); *Bold* v. *Williams* (2); *Reg.* v. *Vestry of St. Luke's, Chelsea* (3); *Thompson* v. *Brighton Corporation* (4); *Cowley* v. *Newmarket Local Board* (5); *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (6) If the respondents are right, a local authority cannot exercise its power of raising or lowering a street without coming under a possible obligation to shift the position of every pipe or other thing which may have been laid under it by companies having statutory privileges whether for water, gas, electric light, or power, or for telephonic or other purposes. The respondents rely upon *Geddis* v. *Bann Reservoir Proprietors* (7) as an authority in their favour; but in that case the defendants had interfered with and damaged the plaintiff's property, which distinguishes it from the present. This is not a case in which any injunction can be granted against the appellants.

Warrington, Q.C., and *Gore-Browne*, for the respondents. The 98th section, which must be read as a whole, in empowering a district board to raise or lower the ground of a street, empowers it at the same time to alter the position of any mains or pipes in or under such street. And having these statutory powers, they come under a common law duty so to use them as not to injure their neighbours. We do not say that they are bound to do anything unreasonable, but we say that they are not entitled to use the first part of their power unless at the same time they exercise the second part of it to minimise or remove any injury to us; otherwise they are liable in damages for negligence, and we are entitled to an injunction against them: *Geddis* v. *Bann Reservoir Proprietors* (1); *Metropolitan Asylum District* v. *Hill.* (2) The injury here is as much an injury to the public as the duty which the appellants are carrying out is a duty to the public. The respondents ought not to be put to the expense of lowering their pipes.

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(1) (1824) 2 B. & C. 703.

(2) (1857) 21 J. P. 84.

(3) (1871) L. R. 6 Q. B. 572; on appeal, 7 Q. B. 148.

(4) [1894] 1 Q. B. 332, 341.

(5) [1892] A. C. 345.

(6) (1877) 2 Ex. D. 441.

(7) 3 App. Cas. 430.

Powers must not be exercised carelessly, oppressively, or unreasonably; and although no injury has as yet been actually done, it is quite obvious that in wintry weather serious injury to the pipes will be occasioned for which the appellants will be liable to us in damages. It is, therefore, a proper case for the Court to exercise its power of granting an injunction.

Renshaw, Q.C., in reply, referred to *Edgware Highway Board* v. *Colne Valley Water Co.* (3); *East Molesey Local Board* v. *Lambeth Waterworks Co.* (4); Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 28, 31; Michael & Will on Gas and Water, p. 241.

Cur. adv. vult.

Aug. 8. LINDLEY M.R., after stating the facts of the case :—The 98th section of the Metropolis Management Act, 1855 under which the respondents are about to lower the surface of this street, in terms simply confers a power; its language imposes no duty. The words are, "it shall be lawful," &c. These words may, no doubt, under certain circumstances impose a duty as well as confer a power, but it is for those who contend that they do both to make good their contention. Nothing can be clearer on this point than the judgment of Lord Cairns in *Julius* v. *Bishop of Oxford.* (5) The defendants have not touched or disturbed the plaintiffs' pipes. They have in no way injured them; and this circumstance distinguishes the case from the *Gas Light and Coke Co.* v. *Vestry of St. Mary Abbotts* (1), in which the steam-rollers used by the defendants broke the plaintiffs' gas-pipes.

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(1) 3 App. Cas. 430.

(2) (1881) 6 App. Cas. 193, 203.

(3) (1877) 46 L. J. (Ch.) 889.

(4) [1892] 3 Ch. 289.

(5) (1880) 5 App. Cas. 214, 223, 224.

The same circumstance—namely, the non-interference with the plaintiffs' property—distinguishes this case from *Geddis* v. *Bann Reservoir Proprietors* (2), where the defendants flooded the plaintiffs' land, and said in effect that they could not help it. The answer was that they could help it if they kept a stream into which they poured water free from obstruction by mud, which they could do if they chose. Lord Blackburn's remarks (3), on which the plaintiffs mainly relied, had reference to that state of things, and do not shew what the plaintiffs must shew, namely, that s. 98 imposes a duty on the defendants to lower the plaintiffs' pipes, although the defendants do not want to do so for their own purposes.

Underlying the plaintiffs' contention is the assumption that they are entitled to have a certain amount of soil over their pipes. I can find no warrant for this assumption; and as the defendants are clearly empowered by s. 98 to remove the soil above the pipes, I see no ground for saying that the additional power conferred upon them of lowering the plaintiffs' pipes imposes the duty of lowering them in order to protect them from injury. The plaintiffs pay nothing for the privilege of laying their pipes down in a public path or road, and they run the risk of having the surface made higher or lower by the road authorities under their statutory powers.

This conclusion is strengthened by s. 61 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), which is in pari materia, and which empowers the improvement commissioners to raise or lower pipes "if they deem it necessary" so to do. No duty to do so is cast upon them. Sect. 98 of the Metropolis Management Act, although not quite so clearly worded, has, in my opinion, the same meaning.

The appeal motion having by consent been treated as an

(1) 15 Q. B. D. 1.

(2) 3 App. Cas. 430.

(3) 3 App. Cas. 456.

appeal from a final judgment in the action, the order appealed from must be discharged and judgment be entered for the defendants, with costs here and below, and the costs below must be taxed as between solicitor and client, pursuant to the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.

CHITTY L.J. I am of the same opinion.

The case is one of some importance: for the decision will affect not only water companies, but gas and other like companies who have the like statutory privilege of laying pipes under the public streets in the metropolis. For these privileges they make no payment. The case turns on the 98th section of the Metropolis Management Act of 1855. That section confers powers on the road authority to pave and repair the streets when and so often as, and in such manner as, that authority think fit, and to raise or lower the ground or soil in such manner as they think proper. This is the principal power; and it is discretionary. Then they have power to alter the position of mains and pipes in or under the street. This is a supplemental or subsidiary power; if it is exercised, the alteration of the position of the mains or pipes is subject to the approval of the engineer of the company to which the mains or pipes belong.

In this case the road authority has not altered the position of the pipes, nor have they in any way disturbed or interfered with them. The effect of their works, which have been lawfully executed under their principal power, is to bring the surface of the street nearer to the pipes which remain in situ. The consequence is that the water in the pipes being but a few inches from the surface is more exposed to frost. In exercising the power the road authority has not been guilty of any negligence. I am unable to find in the section any express or implied duty cast upon the road authority, when they exercise their power of altering the level of the road, whether by raising or lowering it, to exercise at their own expense their power of altering the position of the pipes for the benefit of the company owning the pipes, much less any duty to place the pipes at a depth below the new surface corresponding with the depth at which they stood below the old surface. I think that no such duty is imposed upon the appellants. The real question is on whom the expense of altering the position of the pipes is to fall. It appears to me that it falls on the company. They are under no statutory obligation as to the particular depth at which their pipes are to be placed from the surface of the road; it is for them to place them at such a depth as will protect the water from freezing. As between the road authority and the company, I think that the road authority are paramount. They are entrusted with the powers over the street, not for their own profit as a statutory body, but for the benefit of the public using the streets as a highway. The statutory undertaking of the water company is vested in them with a view to their own profit as a company, and for the purpose of affording a supply of water to the consumers of water within their district. When the road authority alters the level of the street, the 98th section does not afford any means of ascertaining the point at which the supposed duty of the road authority begins in reference to the distance from the surface at which the pipes are to be left, subject only to this qualification, that, where the position of the pipes themselves is altered, the approval of the company's engineer is required in relation to the position where the pipes are to be relaid.

In regard to the authorities cited, I think they are distinguishable as stated by the Master of the Rolls; and I agree with Collins L.J. (whose judgment I have had an opportunity of reading) in his statement of the general principles of law derived from the authorities in reference to the exercise of statutory powers.

COLLINS L.J. I am of the same opinion; but I will add a few words on the point based on the dictum of Lord Blackburn in *Geddis* v. *Bann Reservoir Proprietors*. (1)

The point urged is that the plaintiffs have suffered damage by the exercise by the defendants of their statutory powers; that the defendants were armed, by the same statute, with other powers which, if used, would have mitigated the damage, and that therefore they were bound to use them. I think it is quite clear, as pointed out by the Master of the Rolls, that the power to move the pipes is merely ancillary to the powers of levelling the highway, and that there is no statutory duty on the defendants to exercise it unless they require it for the performance of their primary obligation. But it is not on the assertion of such a statutory duty that the argument for the defendants' liability is or must be based, but on the broader proposition that being possessed of a power of mitigating damage arising from their proceedings under the statute, they are bound to exercise it. So stated, it is merely an assertion of the proposition so frequently affirmed that, where statutory rights infringe upon what but for the statute would be the rights of other persons, they must be exercised reasonably, so as to do as little mischief as possible. The public are not compelled to suffer inconvenience which is not reasonably incident to the exercise of statutory powers. The railway spark cases are instances of this principle: see *Vaughan* v. *Taff Vale Ry. Co.* (1); *Hammersmith and City Ry. Co.* v. *Brand* (2); and see also *Coats* v. *Clarence Ry. Co.* (3) In *Geddis* v. *Bann Reservoir Proprietors* (4) Lord Blackburn was dealing with a case in which the rights of adjoining owners had been in fact invaded, the statute under which the defendants acted not enabling them to flood the plaintiff's lands when such flooding might have been avoided by dredging, as the defendants had power to do, the channel by which they sought to pass their compensation water back to the river. They were under a duty to pass the water down to the river, and they were given powers to make and maintain channels for this purpose, and where they had not exercised these powers they could not say that the damage to the adjoining proprietors was a necessary incident of the exercise of their statutory right. The statutory power which Lord Blackburn thought them bound to exercise was one without which their duty of passing the water on could not be properly carried out. Here the

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(1) 3 App. Cas. 430.

(1) (1860) 5 H. & N. 679.
(2) (1869) L. R. 4 H. L. 171.
(3) (1830) 1 Russ. & My. 181.
(4) 3 App. Cas. 430.

levelling of the road could be and was effectively carried out without in any way disturbing the plaintiffs' pipes or infringing any of their rights. I think the dictum of Lord Blackburn must be read with reference to the case he was dealing with, and cannot be pressed to cover this one. But it must be admitted that the defendants are bound to exercise their statutory powers with reasonable regard for the rights of other persons. I think when it is once clear that the main purpose of the defendants could be completely carried out without recourse to the power of moving the pipes, the obligation of the statutory body must be tried by the same standard of duty as is applicable to private persons. Of course, being merely a creature of statute, they cannot exercise powers if the statute has not conferred them; but it does not follow that they are bound to use them because they possess them any more than a private person would be. They merely fall under the general principle "sic utere tuo ut alienum non lædas."

Here the plaintiffs have no right to any particular thickness of soil above their pipes. They are subordinate in this respect to the duties of the road authority: see *Gas Light and Coke Co.* v. *Vestry of St. Mary Abbotts.* (1) I think they can have no higher claim to consideration at the hands of the defendants than the owner of a house, for which no right of support from the adjoining house had been acquired, would be entitled to claim against the adjoining owner, who in pulling his own house down withdraws support to which his neighbour is not entitled. I think it is clear in such case that, though the pulling-down owner must be careful to interfere as little as possible with the adjoining house, he is certainly not called upon to take active steps for its protection, as, for instance, by shoring it up. There is a broad distinction between exercising a right with reasonable care so as not to do avoidable damage, and taking active measures to insure the continuance of something that is not a right in the adjoining owner.

Chadwick v. *Trower* (2) (which goes perhaps further than any other case in the plaintiffs' favour) merely decides that,

(1) 15 Q. B. D. 1.

(2) (1836) 3 Bing. N. C. 334, 354; (1839) 6 Bing. N. C. 1.

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supposing there is a duty upon a person pulling down his own house to take care not to injure his neighbour's vault in so doing, where he knows of its existence, though it has acquired no right to support, there can be no such duty where he does not know of it. And it cannot be the law that the pulling-down owner is bound to find a substitute or equivalent for the support which he has a right to remove. That he has such right is clear: see *Dalton* v. *Angus*. (1)

I think the result is that though the person pulling down is bound to do no unnecessary damage, he is not fixed with any obligation to take active steps to mitigate a mischief which follows inevitably upon the reasonable exercise of his own rights.

I think, therefore, the only obligation on the defendants was to use reasonable care to do no unnecessary damage to the plaintiffs; and I think the existence of the power to move the pipes, and the fact that it was unused, would afford no evidence of want of such reasonable care, and that therefore the judgment ought to be for the defendants.

Solicitors: *Lanfear, Tanner & Lanfear; W. W. Young & Son.*

W. W. K.

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(1) (1881) 6 App. Cas. 740.

NORTH J.
1898
Feb. 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15; *Aug.* 4.

JORDESON *v.* SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY.

[1896 J. 1503.]

Statute—Gas Company—Nuisance—Gasworks Clauses Act, 1847 (10 & 11 *Vict. c.* 15), *s.* 29—*Gasworks Clauses Act*, 1871 (34 & 35 *Vict. c.* 41), *s.* 9.

A gas company empowered by statute to purchase defined land by agreement and erect gasworks thereon, *held* not empowered to do so to the injury of neighbouring property; the case not being within the decision in *London, Brighton and South Coast Ry. Co.* v. *Truman*, (1885) 11 App. Cas. 45.

A gas company under the Gasworks Clauses Acts, 1845, 1871, is expressly liable for private nuisance committed in the construction of works, as well as in the manufacture of gas.

The plaintiff was the owner of certain cottages known as Clyde Terrace, Sitwell Street, in the borough of Kingston-upon-Hull. The first defendants were the Sutton, Southcoates and Drypool Gas Company, who were erecting on part of their premises adjoining the plaintiff's cottages a very large gasholder, the subject-matter of this action. Messrs. Holme & King, contractors employed in the construction of the wall or circular tank in which the gasholder was intended to float, were the other defendants to the action. The internal diameter of the tank was 152 feet; the projected gasholder was to be telescopic, in three rings, so that when fully inflated its height above the ground level would be 105 feet.

The plaintiff alleged that, through the negligent working of the contractors and by the pumping out of water containing silt from the defendants' work, support had been withdrawn from the ground on which his cottages stood, causing irregular subsidence of the ground and injury to his buildings. At the trial the work had progressed so far that there was no danger of further subsidence. Damages were claimed against all the defendants.

The plaintiff also alleged that, if the defendant company were allowed to erect their gasholder to the intended height of 105 feet, the ancient lights of his cottages would be obstructed. On this head he claimed an injunction against the gas company.

The defendant company pleaded that if damage were caused to the plaintiff by their works, there was no negligence; and that, apart from negligence, they were exempted from liability because the work was done in pursuance of statutory powers and under statutory duty. The defendant contractors denied negligence, and pleaded that as contractors they were not liable.

At the conclusion of the arguments the judge expressed his opinion that upon the facts proved the contractors had not been guilty of negligence in the execution of the works, though they had proved insufficient to prevent subsidence: that such subsidence was occasioned by the escape of silt from the plaintiff's land, and his houses had been damaged thereby: and that the lights of such houses would be materially obstructed if the gasholder was raised to the full height contemplated: but he reserved judgment upon the points of law argued.

The defendant gas company were incorporated by Act of Parliament passed in 1867 for the purpose of taking over and carrying on existing gasworks. The Gasworks Clauses Act, 1847, was incorporated with the Act. By an amendment Act passed in 1873 (36 & 37 Vict. c. lxxv.), of which s. 3 incorporated the Gasworks Clauses Act, 1871, they were authorized (s. 4) by agreement to purchase or take on lease and use such of certain lands, including the site of the gasholder, the subject of this action, as they might require for the purpose of their undertaking. And by s. 6 they were empowered on these lands to "erect, maintain, and from time to time alter and enlarge retorts, gasholders, receivers, purifiers, meters, apparatus, and works, for the manufacture and storing of gas, and matters producible therefrom." The site of the gasholder was purchased by the defendant company in 1877.

Upjohn, Q.C., and *Dighton Pollock*, for the plaintiff. The main defence is that the acts of the defendants are authorized by statute, and that they are not liable for injury caused to their neighbours, though a private individual would be liable who committed the acts which in respect of subsidence have caused, or in respect of obstruction to light will cause, such injury. And it is sought by the defendants to bring their case within the principle that governed the decision in *London, Brighton and South Coast Ry. Co.* v. *Truman.* (1)

From the language and the distinctions drawn by the judges in these very cases, as well from the numerous decisions where such corporations as the defendants have been held liable for nuisance committed in the construction of works or carrying out the objects of the company, it is clear that the defendants can have no such immunity as they claim: *Metropolitan Asylum District* v. *Hill* (2); *Geddis* v. *Bann Reservoir Proprietors* (3); *Shelfer* v. *City of London Electric Lighting Co.* (4); *Normanton Gas Co.* v. *Pope* (5); *London and North Western Ry. Co.* v. *Evans.* (6)

It lies on the defendants to prove their statutory immunity: *Clowes* v. *Staffordshire Potteries Waterworks Co.* (7)

Among the circumstances distinguishing this case from the railway cases, such as *London, Brighton and South Coast Ry. Co.* v. *Truman* (1), are the following. The defendants' Acts contain no compensation clause, which of itself affords the strongest presumption that the Legislature did not intend to give power to injure the corporation's neighbours with impunity; secondly, the Gasworks Clauses Acts, 1847 and 1871 (10 & 11 Vict. c. 15, s. 29; 34 & 35 Vict. c. 41, s. 9), contain express provision that gas companies are liable for nuisance: *Attorney-General* v. *Gas Light and Coke Co.* (8); and, thirdly, it was not necessary for the defendants to place the new gasholder on the particular spot, or to build it of the large dimensions contemplated. Unless the defendants can shew the overriding statutory powers they claim, the plaintiff has a right to the support of his land from his neighbour's land at common law; and we submit that the subsidence of the land would have taken place independently of the buildings; as to the buildings, he has a right to the support by prescription. The evidence establishes that the subsidence is caused by the abstraction of silt; the mere taking away water would not have caused such subsidence. The defendants have no right to abstract solid matter from the plaintiff's land even by draining it—certainly not by taking it out in the form of wet sand: *Dalton* v. *Angus* (1); *Lemaitre* v. *Davis* (2), which do not conflict with such cases as *Chasemore* v. *Richards* (3); *Popplewell* v. *Hodkinson* (4); *Rigby* v. *Bennett* (5); *Grand Junction Canal Co.* v. *Shugar.* (6) The right to support is the right to the ordinary enjoyment of land: *Backhouse* v. *Bonomi.* (7) With respect to the injury to light, on the assumption that the Court finds that the projected holder will in fact interfere detrimentally with the access of light to cottages, an injunction will be granted, and not merely damages awarded: *Sayers* v. *Collyer* (8); *Martin* v. *Price* (9); *Shelfer* v. *City of London Electric Lighting Co.* (10)

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(1) 11 App. Cas. 45.
(2) (1881) 6 App. Cas. 193.
(3) (1878) 3 App. Cas. 430.
(4) [1895] 1 Ch. 287.
(5) (1883) 32 W. R. 134.
(6) [1893] 1 Ch. 16.
(7) (1872) L. R. 8 Ch. 125.
(8) (1877) 7 Ch. D. 217.

Haldane, Q.C., Hon. E. C. Macnaghten, Q.C., and *Boome,* for the defendant gas company. The first point on which we rely is one that, if decided in our favour, will, apart from the question of negligence—a question of fact—settle the trial in favour of the defendants; we say that the Legislature has conferred on the defendant company a power, coupled with a duty, to do the acts complained of on the spot where they have been done; and, so long as no negligence can be shewn to have induced the damage complained of, the plaintiff has no right of action. The case is like that of *London, Brighton and South Coast Ry. Co.* v. *Truman* (11), and comes within that decision and similar cases, such as *Rex* v. *Pease* (12); *Vaughan* v. *Taff Vale Ry. Co.* (13); *Hammersmith and City Ry. Co.* v. *Brand* (14); *Duke of Bedford* v. *Dawson.* (15) The principle of these cases, that for public purposes private rights may be overridden, was also acted upon in *Emsley* v. *North Eastern Ry. Co.* (16); *Kirby* v. *Harrogate School Board.* (17)

(1) (1881) 6 App. Cas. 740.
(2) (1881) 19 Ch. D. 281.
(3) (1859) 7 H. L. C. 349.
(4) (1869) L. R. 4 Ex. 248.
(5) (1882) 21 Ch. D. 559.
(6) (1871) L. R. 6 Ch. 483.
(7) (1861) 9 H. L. C. 503, 512.
(8) (1884) 28 Ch. D. 103.
(9) [1894] 1 Ch. 276.
(10) [1895] 1 Ch. 287.
(11) 11 App. Cas. 45.
(12) (1832) 4 B. & Ad. 30.
(13) (1860) 5 H. & N. 679.
(14) (1869) L. R. 4 H. L. 171.
(15) (1875) L. R. 20 Eq. 353.
(16) [1896] 1 Ch. 418.
(17) [1896] 1 Ch. 437.

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The absence of compensation clauses is one circumstance only to be taken into account in considering whether the Legislature has given an overriding power to do the authorized things, notwithstanding private persons may be injured, but is not sufficient, in a case like this, to cut down the power coupled with a duty given by the Legislature for the purpose of providing a public want. In none of the cases have the judges said that the absence of a compensation clause went beyond this.

The defendants have no choice beyond narrow limits of the position where they are to place their gasholder; and their expert advisers are the persons to whose opinion the proper mode of carrying out the necessary works has been entrusted by the Legislature; and the Court will not go behind their decision.

The nuisance clauses in the Gasworks Clauses Acts apply only to the manufacture of gas, and is applicable to such cases as *Attorney-General* v. *Gas Light and Coke Co.* (1), and do not apply to the construction of the works.

As the defendant company have a power and a duty to perform in respect of supply of gas, they could not make any grant in derogation of their powers; therefore neither right to support of the buildings nor right to access of light could be prescribed for against them: *Mulliner* v. *Midland Ry. Co.* (2); *Ayr Harbour Trustees* v. *Oswald* (3); *Staffordshire and Worcestershire Canal Proprietors* v. *Birmingham Canal Proprietors.* (4)

If there has been any subsidence caused by the defendants' working, it has been caused by their lawful act in pumping water; the fact that some sand or silt was in suspension makes no difference. It would be a similar case if some supporting matter were dissolved and removed in solution. A man has a right to pump water from his own well, even though he drains his neighbour's land and causes it to subside: *Chasemore* v. *Richards* (5); *Popplewell* v. *Hodkinson* (6);

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(1) 7 Ch. D. 217.
(2) (1879) 11 Ch. D. 611.
(3) (1883) 8 App. Cas. 623.
(4) (1866) L. R. 1 H. L. 254.
(5) 7 H. L. C. 349.
(6) L. R. 4 Ex. 248.

Pickles v. *Bradford Corporation* (1); *Elliot* v. *North Eastern Ry. Co.* (2); *Darley Main Colliery Co.* v. *Mitchell.* (3)

The damage to the plaintiff in respect to light, if any, is so small that the Court will not grant an injunction of such enormous injury to the gas company.

The right to the enjoyment of natural advantages which the owner of land has is subject to the right of his neighbour, which may interfere with such enjoyment: *Bryant* v. *Lefever.* (4)

Rawlins, Q.C., and *Bardswell*, for the contractors. We claim the benefit of the defences of the gas company; the contractors cannot be liable for anything for which the employer is not liable. We further say that, if the defendant company be liable, there is no duty or obligation on the part of the contractors to the plaintiff; and, if they have been guilty of no negligence, they can be liable for nothing.

Upjohn, Q.C., in reply.

At the trial his Lordship gave judgment on the facts as above stated, and reserved judgment on points of law.

Aug. 4. NORTH J. (after referring to his previous decision on the facts) continued:—The first proposition put forward on behalf of the defendants was that the construction of the tank and erection of a gasholder were acts for which the gas company have statutory powers, with a statutory duty to exercise them; and that such powers cannot be released, and no easement can be acquired in derogation of them. Mr. Haldane put it that what the defendants are doing is by statutory authority to do those things on the sites in question, and consequently cannot be unlawful, and cannot be restrained by injunction, or give occasion to an action for damages, and that the Acts must be construed with this principle in view; and he cited the well-known railway cases of *Rex* v. *Pease* (5), *Vaughan* v. *Taff Vale Ry. Co.* (6), *Hammersmith and City Ry. Co.* v. *Brand* (7), and *London, Brighton and South Coast Ry. Co.* v.

(1) [1895] 1 Ch. 145; [1895] A. C. 587.

(2) (1863) 10 H. L. C. 333.

(3) (1886) 11 App. Cas. 127.

(4) (1879) 4 C. P. D. 172.

(5) 4 B. & Ad. 30.

(6) 5 H. & N. 679.

(7) L. R. 4 H. L. 171.

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Truman (1), and other cases of the same character. But Lord Halsbury pointed out in the latter case, distinguishing it from the Small-Pox Hospital case, *Metropolitan Asylum District* v. *Hill* (2), that the Railway Acts are a well-known and recognised class of legislation expressly and carefully distinguished from the permissive character of the legislation there under consideration; the distinction being that a small-pox hospital might be built and maintained if it could be done without creating a nuisance; whereas the Railway Acts were assumed to establish the proposition that the railway might be made and used whether a nuisance was caused thereby or not. A great deal of time was devoted to a careful comparison of the two cases I have last named; but I do not think it necessary or profitable now to go minutely into them: it will suffice to refer as a guide to what Lord Selborne says. (3) [After reading the judgment of Lord Selborne at p. 201, his Lordship continued:—]

The defendants allege that what I have just read does not apply to the present case, because here a limit of space is defined within which the works in question may be done; but though the site is fixed, beyond which the gas company have no powers, this does not throw any light upon the question what works are authorized upon that site. In such a case as the present the question whether the Acts interfere with the private rights of the plaintiff depends upon the construction of the Acts; and the onus of proof is on the defendants. As Mellish L.J. says in *Clowes* v. *Staffordshire Potteries Waterworks Co.* (4): The plaintiff's right of action "must still continue, unless it has been taken away by the Acts of Parliament, and the burden of shewing that it has been taken away by the Acts of Parliament, beyond all question, is upon the defendants; because, if a public company or any individuals obtain an Act of Parliament which they say enables them to take away the common law rights of any person, they are bound to shew that it does it with sufficient clearness." See also the very clear and emphatic language of Lord Watson in his reasons in

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(1) 11 App. Cas. 45.
(2) 6 App. Cas. 193.
(3) 6 App. Cas. 201.
(4) L. R. 8 Ch. 139.

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Metropolitan Asylum District v. *Hill.* (1) [His Lordship read the passage referred to, and continued :—]

In construing the Act, one important consideration is that, if the defendants are right, the plaintiff must himself bear the damage he sustains from the defendants' works without receiving any compensation for it from the defendants. It is not suggested that in the present case the defendants' Acts provide for any such compensation. The Court has always held that the absence of a provision for compensation to a person whose legal rights are interfered with places a great difficulty in the way of those who contend that such rights are taken away. In *Hammersmith and City Ry. Co.* v. *Brand* (2) Lord Cairns says that this fact that an action is not maintainable against a company does predispose the mind to find in the enactments upon this subject compensation in some form or other for the loss which a landowner sustains; and he adds: "I do not mean to say that it would be safe to strain the words of an Act of Parliament on account of considerations of that kind, but if there be any doubt or ambiguity in the words, the consideration ought not to be overlooked that, beyond all doubt, the intention of legislation of this kind is that, in some shape or other, compensation should be made to those who sustain loss or harm by the operation of the parliamentary powers." Bowen L.J., in *London and North Western Ry. Co.* v. *Evans* (3), says: "The Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle as it can override the former, if it sees fit to do so, but it is not likely that it will be found disregarding it, without plain expressions of such a purpose." And in *Bradford Corporation* v. *Pickles* (4), dealing with an Act for supplying the town of Bradford with water, Lord Herschell says (5): "Having regard to the nature of the Act and its provisions generally, I think there is a strong presumption that the section in question was not intended to interfere with the rights of any person without compensation"; and a few lines further on he adds: "It was urged that the Act recites that a supply of pure water would be of advantage to the town of Bradford. This, no doubt, was a justification for conferring the power of taking the property of private persons by compulsion, even though it were on the terms of making compensation. But the undertaking was constituted with the view of making profit, and it would not be in accordance with the ordinary course of legislation to take away without compensation the private rights of individuals for the benefit of the undertakers, or even for the benefit of the inhabitants of Bradford." See also the strong remarks to the like effect of the Master of the Rolls in *Normanton Gas Co.* v. *Pope* (1), and of Lord Esher in *Consett Waterworks Co.* v. *Ritson.* (2)

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(1) 6 App. Cas. 212, 213.
(2) L. R. 4 H. L. 215.
(3) [1893] 1 Ch. 28.
(4) [1895] 1 Ch. 145.
(5) [1895] 1 Ch. 152.

This is a convenient place to refer to another argument strongly pressed by Mr. Haldane, that the defendant company owed some duty to the public, and the preambles of their Acts shewed that the powers conferred upon them were given for the public benefit, and therefore as against them all private and individual interests should give way. A complete and sufficient answer to this will be found in the observations of Bowen L.J. and Lord Herschell which I have just quoted, and of Lord Cranworth in *Broadbent* v. *Imperial Gas Co.* (3), where he says: "If it should turn out that the company had no right so to manufacture gas as to damage the plaintiff's market-garden, I have come to the conclusion, that I can not enter into any question of how far it might be convenient for the public that the gas manufacture should go on"; and of Lord Campbell in the same case in the House of Lords, where he says (4): "Well then, what is the great inconvenience that is to arise to the appellants? It is said that they have a duty to perform to the public. I consider that this is to be regarded as a mere commercial adventure; they have the liberty to make these works for their own profit, but no indictment would lie against

(1) 32 W. R. 134.

(2) (1889) 43 W. R. 122.

(3) (1857) 7 D. M. & G. 436, 462.

(4) (1859) 7 H. L. C. 600, 610.

them for omitting to do so; no action could be maintained against them if they could not supply gas."

But I think there is one conclusive answer to the principal argument of the defendants that the Acts confer upon them an absolute right and duty to do these acts upon this very site. This proposition is, in my opinion, wholly unfounded. The Acts do indeed authorize the erection of a gasholder at this place; but there is no obligation upon the defendant company to place it upon this exact site, or to make it of such a height or size, as they have chosen to do. While the Act defines the land upon which the works may be done if the company can buy it, it does not anywhere prescribe what the works are to be, nor require anything to be done which must necessarily injure the plaintiff. To make out their case the company must shew that they cannot, without interference with the plaintiff's rights, do something they are bound to do: see *Attorney-General* v. *Gas Light and Coke Co.* (1) and the remarks of Pollock B. in the small-pox case (2), of Lord Selborne in *Truman's Case* (3), and of Lindley L.J. in *Shelfer* v. *City of London Electric Lighting Co.* (4) And in this they have wholly failed. If the gasholder had been somewhat smaller or somewhat further from the plaintiff's land, there is no reason for supposing that it would have interfered with his right to light or to support; and, beyond all this, it is a mistake to say that an absolute power to do such things as are complained of can be found in the Acts. Such rights or powers as are conferred upon the defendant company—so far from being absolute or unqualified, as asserted by counsel—are very strictly limited and guarded. Sect. 29 of the Gasworks Clauses Act, 1847, provides that nothing therein or in the special Act contained should prevent the undertakers from being liable to an indictment for a nuisance, or to any other legal proceeding to which they might be liable, in consequence of making or supplying gas. And s. 9 of the Gasworks Clauses Act, 1871, enacts that "Nothing in this or the special Act shall exonerate the Undertakers from any indictment, action, or other proceeding for

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(1) 7 Ch. D. 217.
(2) 4 Q. B. D. 443.
(3) 11 App. Cas. 57.
(4) [1895] 1 Ch. 313.

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nuisance in the event of any nuisance being caused by them." And, in my opinion, the interference with the plaintiff's support and light is a nuisance. In the small-pox hospital case Pollock B. said (1): "A statute which justified the defendants in creating a nuisance to neighbours, would seem by parity of reasoning to justify the diminution of light or air, and this, although the statute contained no provisions for compensating those who might be injured by its operation"; and paraphrasing this, so as to apply it to the present case, I hold that the Acts which forbid the gas company to create a nuisance to a neighbour also forbid the taking away of his light, or of the support to his land, especially when the Acts contain no provision for compensating those injured by their operation.

The effect of such a prohibition against the creation of a nuisance has been a frequent subject of consideration; and the cases shew clearly that where such clauses as the above are found the decisions as to the legalization of a nuisance by a railway, in such cases as *Rex* v. *Pease* (2), *Vaughan* v. *Taff Vale Ry. Co.* (3), and *London, Brighton and South Coast Ry. Co.* v. *Truman* (4), are wholly inapplicable. Among such cases are *Attorney-General* v. *Leeds Corporation* (5), where the thing complained of was the fouling of a river; *Attorney-General* v. *Gas Light and Coke Co.* (6), where the matter of complaint was an offensive smell from gasworks set up under statutory powers, as in the present case; and the recent case in the Court of Appeal of *Shelfer* v. *City of London Electric Lighting Co.* (7), in which one subject of complaint was structural injury to the plaintiff's houses by works of the defendants upon adjoining land under the provisions of the Electric Lighting Acts and a Provisional Order to which statutory confirmation had been given.

A further point strongly pressed upon me by the defendants' counsel was that the defendant company are a statutory body with limited powers as to their property, and unable to bind either themselves or their successors to anything by which their property can be diverted or applied to any purposes outside those for which it is vested in them; and that as the plaintiff's predecessors had no prescriptive right in 1873 to any support or light for houses first erected in 1866, and the defendants were incapacitated from doing or permitting anything by which such right could be subsequently acquired, no legal right to support or light has ever arisen, and no action can be maintained in respect thereof; and the cases of *Staffordshire and Worcestershire Canal Proprietors* v. *Birmingham Canal Proprietors* (1), *Mulliner* v. *Midland Ry. Co.* (2), and *Ayr Harbour Trustees* v. *Oswald* (3) were relied on.

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(1) 4 Q. B. D. 443.
(2) 4 B. & Ad. 30.
(3) 5 H. & N. 679.
(4) 11 App. Cas. 45.
(5) (1870) L. R. 5 Ch. 583.
(6) 7 Ch. D. 217.
(7) [1895] 1 Ch. 287.

But to this argument there are many answers. First, as to the support. Such support of land by the land adjoining has existed in nature from all time, and has existed as a legal right at any rate from the time when the land supporting and the land supported became vested in different owners, which we know was the case here before the Companies Act of 1867 was passed. The defendant company did not acquire that part of the site of the new gasholder which adjoins the plaintiff's land until 1877; and nothing turns upon what they have done or permitted since that date. At that time the owner of the plaintiff's land had already a right to have his land supported by the land now belonging to the company, who only acquired the land subject to this burthen of support already existing. Then, as to the houses. It has never been suggested in this case that their existence makes any difference, or that what has occurred would not equally have happened if there had been no houses on the land, though no doubt that circumstance would have affected the amount of damages. But when the defendants' works were commenced the houses had been standing more than thirty years, and primâ facie had gained by prescription a right to support, founded upon an implied grant. This grant must be assumed to have been made at any rate as far back as the commencement of the enjoyment—namely, at the time when the houses were erected; and there is no evidence or ground for believing that the owner at that time of the land, the defendants

(1) L. R. 1 H. L. 254.

(2) 11 Ch. D. 611.

(3) 8 App. Cas. 623.

subsequently acquired, was in any way incapacitated from granting a full right to the support which the houses have ever since enjoyed, or was subject to any such disability as that to which the defendant company allege that they have been subject since their purchase.

Then, as to light. The observations I have already made as to support would apply to light also, if the two were, as the defendants' counsel contended, similar easements to be acquired by prescription. But this is not the true way of looking at the case. The right of light now depends upon s. 3 of the Prescription Act (2 & 3 Will. 4, c. 71), which enacts that, "When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing": an exception which has no application to the present case. And in *Tapling* v. *Jones* (1) Lord Westbury, after referring to that section, pointed out that the right to light under the statute depends upon positive enactment; and does not require, and therefore ought not to be rested on, any presumption of grant, or fiction of a licence having been obtained from any adjoining proprietor.

As regards the further point, that the defendants have merely drained their own land, and have a right to do so even if the result is that they thereby drain their neighbour's soil also, I have come to the conclusion that this is not all, or anything like all, that the defendants have done; but I will not repeat my reasons for this, as they have already been given.

I now proceed to consider the case of the defendants Holme & King. The complaint against them is in respect of the consequences arising from the excavation of the trench only. They have nothing to do with the erection of the gasholder itself.

Their counsel contended that they could only be liable for negligence; and there could be no negligence unless there was some neglect of duty, and they did not owe any duty to the

(1) (1865) 11 H. L. C. 290.

plaintiff. I failed wholly to follow this argument. They are the persons who by their workmen made this excavation upon the company's land, the result of which was wrongfully to remove part of the plaintiff's soil, and thereby to cause the land above it to shift and subside, and so damage the buildings thereon. If this does not give a cause of action, I do not know what does. Nor does it matter what care they took in what they did if such care did not suffice to prevent the injury. If no amount of care could have prevented it, the act ought not to have been done at all.

In the case of *Imperial Gas Co.* v. *Broadbent* (1), Lord Campbell pointed out that the plaintiff had a right to the enjoyment of his land without a nuisance upon it, and that the defendants had caused the nuisance by the manner in which they had constructed their works; and then he added (2): "whether that was done skilfully or negligently I think would be quite immaterial, if they had been guilty of some excess in the carrying on of their works, whereby the plaintiff had been injured, in violation of the maxim, sic utere tuo ut alienum non lædas."

It was not urged before me that liability for this injury would not attach to the employer and contractor alike. It is quite clear that it does: the case of *Dalton* v. *Angus* (3) is an express authority upon this point also; and there are many recent decisions to the same effect, the latest of which, so far as I am aware, is *Hardaker* v. *Idle District Council.* (4)

The only further matter to be considered is the relief to be granted. As regards the interference with the plaintiff's lights, I have no course open to me but to grant an injunction. The principles which lie at the foundation of the decisions in *Imperial Gas Co.* v. *Broadbent* (1), *Martin* v. *Price* (5), and the recent case of *Shelfer* v. *City of London Electric Lighting Co.* (6), leave me no choice in the matter. The latter case sums up the whole law on the subject, and was too fully discussed here to make it necessary for me to refer to it further, except by saying that the present case cannot in my opinion

(1) 7 H. L. C. 600.
(2) Ibid. 606.
(3) 6 App. Cas. 740.
(4) [1896] 1 Q. B. 335.
(5) [1894] 1 Ch. 276.
(6) [1895] 1 Ch. 287.

be brought within any of the exceptional cases there mentioned in which damages might be substituted for an injunction. It does not I think come within any one of the tests suggested by A. L. Smith L.J. The plaintiff has done nothing to disentitle him to his legal rights; and it would be wrong for me to give him instead pecuniary damages the amount of which would depend on a guess only. The present case is, however, exceptional in one respect. By the concurrent evidence of the plaintiff's own witnesses, I have been driven to the conclusion that if the gas-holder were carried to a height not exceeding 68 feet above the surface of the ground, being two-thirds of the height contemplated, it would not materially affect the lights of the plaintiff; and to prevent the reopening hereafter of a matter so fully gone into before me, I intend, while granting an injunction in the usual form, to add a proviso at the end that this order is not to prevent the defendant company from raising their gas-holder on its north side to the height of 68 feet from the surface of the ground. To that extent, at any rate, the contest is ended.

With regard to the interference with the support to the plaintiff's land and houses, the matter stands in a different position. The intended work has been completed in an apparently satisfactory manner: the wall has been built and puddled, and the trench has been filled in. Since that was done no further subsidence has taken place, nor is any anticipated in the future.

[His Lordship, at the request of the parties assessed the damages in respect of subsidence. He granted an injunction to restrain the defendant gas company from carrying their gas-holder to a greater height than 68 feet; he gave judgment against all the defendants for 340*l.* damages; judgment for the whole costs of the action against the gas company; and for the costs of so much of the action as related to the subsidence against the defendant contractors.]

Solicitors: *Bell, Brodrick & Gray, for Laverack & Son, Hull; Collyer-Bristow & Co., for Stamp, Jackson & Birks, Hull; Jaques & Co., for Samuel Wright & Co., Bradford.*

D. P.

In re SOLTAU'S TRUSTS.

[1898 S. 1303.]

NORTH J.
1898
Oct. 26.

Statute—Construction—Settled Land Act, 1882 (45 & 46 *Vict.* c. 38), ss. 32, 33 —"*Liable.*"

Personal property held by trustees with power to invest in land is liable to be laid out in the purchase of land within the meaning of ss. 32 and 33 of the Settled Land Act, 1882.

THIS summons was taken out by John Thomas Soltau, tenant for life, under a settlement created by three deeds, the first and second being deeds of conveyance, and the third a declaration of trust, dated April 7, 1860, made in contemplation of his marriage with Florence Lady Young, since deceased. The respondents were the trustees of the settled property. By one deed certain reversionary real estate belonging to the intended husband was conveyed to trustees upon trust to sell the same (if during the life of the intended husband or wife, with their consent or the consent of the survivor), and to hold the proceeds on the trusts relating thereto declared by the third deed. Another of the deeds conveyed reversionary real estate of the intended wife to trustees on trust to sell (if during the life of the intended husband or wife, with their consent or the consent of the survivor), and to hold the proceeds on the trusts relating thereto declared by the third deed. The trusts declared by the third deed concerning the proceeds of the respective properties were, in the first place, to invest the proceeds in certain specified securities being personal estate. The deed of trust contained the following declaration:—

"And it is hereby declared and agreed that it shall be lawful for the said trustees or trustee hereof with the consent in writing of the said John Thomas Soltau and Florence Lady Young or the survivor of them to call in and sell and dispose of all or any of the moneys stocks funds and securities which for the time being shall be subject to the trusts hereof and to invest the whole or any part of the same or the proceeds thereof in one or more purchase or purchases of freehold hereditaments in England or Wales which said hereditaments so to be purchased shall be conveyed or assured unto the trustees or trustee hereof upon trust at any time hereafter with the consent in writing of the said John Thomas Soltau and Florence Lady Young or the survivor of them and after the decease of such survivor at the discretion of the said trustees or trustee hereof to sell the hereditaments and premises so to be purchased or any part thereof either by public auction or private contract and in such manner in all respects as the said trustees or trustee hereof shall deem expedient (with power to buy in the same or any part thereof at any auction and to rescind or alter any contract for the sale thereof and to resell the same) and to convey or assure the same hereditaments or premises when sold as the purchaser or purchasers thereof shall direct. And the said trustees or trustee hereof shall invest the moneys to arise from such sale or sales in their or his names or name in some or one of the modes of investment mentioned in the power to change securities hereinbefore contained and shall stand possessed thereof upon the same trusts and with the same provisions (including this present provision) as are hereby declared and made concerning the moneys with which the hereditaments or premises so sold shall have been purchased and that until the sale of such hereditaments or premises the same (although real estate) shall for all the purposes of these presents be considered as personal estate, and the rents and profits thereof shall be received by and applied for the benefit of the person or persons who would be entitled to the annual income of the said trust moneys in case no such purchase had been made."

In the events which had happened the trusts relating to the property representing the real estate comprised in both deeds of conveyance were identical. The real estate had all fallen into possession; some had been sold; the proceeds were partly invested in real estate, partly in personal estate, and to a small extent uninvested. The object of the summons was to enable part of the capital in settlement to be applied in laying out a portion of the real estate in settlement as a building estate.

A question involved was whether the funds invested in personal estate or the cash in hand was, under the power to invest in land set out above, capital "liable to be laid out in the purchase of land" within the meaning of s. 33 of the Settled Land Act, 1882.

A. Adams, for the applicant. An opinion has been expressed in Wolstenholme on Conveyancing and Settled Land Acts, 7th ed. p. 343, adverse to the construction the Court is asked to put on the phrase "money liable to be laid out in the purchase of land," namely, that it includes money subject to a power of investment for the time being in land; though the cases referred to tend to shew that the wider construction is the correct one: *In re Byron's Charity* (1); *In re Bethlehem and Bridewell Hospitals* (2); *Ex parte Vicar of Castle Bytham* (3); and so it has been held by Stirling J. in chambers in *In re Goldsworthy*. (4) I submit that the words of the Act are more consistent with this view. In *In re Hill* (5) it was held that money which trustees were empowered at the request of the tenant for life to invest in particular land came within the phrase in s. 33. It is true that the judge also held that on request being made an obligation on the trustees to so invest attached. The case of *James* v. *Young* (6) affords an analogy in my favour. It was there held that a gale in the Forest of Dean would be liable to be forfeited where the Crown had an option to forfeit it.

D. D. Robertson, for the trustees.

NORTH J. I do not think that either in s. 32 or s. 33 the words "is liable to be laid out in the purchase of land" mean "has to be laid out in the purchase of land." Sect. 33 expressly provides that, "in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act." The reference to other powers of dealing therewith shews to my mind that the section is not confined to moneys that must necessarily be laid out in land. So, again, in s. 32 the words, "in addition to any mode of dealing therewith authorized by the Act under which the money is in court," support this view.

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(1) (1883) 23 Ch. D. 171.
(2) (1885) 30 Ch. D. 541.
(3) [1895] 1 Ch. 348.
(4) Jan. 3, 1898.
(5) [1896] 1 Ch. 962.
(6) (1884) 27 Ch. D. 652.

I agree with the conclusion Stirling J. came to in chambers that the expression "is liable to be laid out in the purchase of land" does not mean "has to be laid out in the purchase of land," but means money subject to some disposition under which it may be laid out in the purchase of land.

Solicitors: *Bell, Brodrick & Gray, for Hellard & Bewes, Stonehouse.*

D. P.

STIRLING J.
1898
June 9, 14; Aug. 3.

BARING-GOULD *v.* SHARPINGTON PICK AND SHOVEL SYNDICATE.

[1897 B. 4932.]

Arbitration — Time for making Award — Umpire — Jurisdiction — Arbitrators "called on to act"—Arbitration Act, 1889 (52 *&* 53 *Vict. c.* 49), *Sched. I.* (*c*).

Sched. I., clause (*c*), of the Arbitration Act, 1889, provides that "The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission. . . ." The expression "called on to act" in the above clause means called on to enter on the substantial business of the reference, and not merely called on to do some specific thing connected with the arbitration, such as to appoint an umpire.

ADJOURNED SUMMONS.

The defendant company was incorporated under the Companies Acts, 1862 to 1890, on July 15, 1896.

Art. 128 of the articles of association was as follows: "If at any time a sale or arrangement shall be made or proposed in pursuance of s. 161 of the Companies Act, 1862, the purchase-money to be paid for the interest of any dissentient member shall be such sum of money as the liquidator can obtain by selling the shares, stock, or other property to which such dissentient member would have been entitled upon the completion of the sale or arrangement had he not expressed his dissent."

In 1897 a scheme was proposed for the reconstruction of the company, and on August 20 and September 6 special resolutions were passed for a voluntary winding-up, and the liquidator was authorised to enter into a contract for sale under s. 161 of the Act.

On September 9 the plaintiff gave notice of dissent from the resolutions.

On October 15 the liquidator entered into an agreement with a new company to be created and to take over the assets and liabilities of the old company.

On November 13 the writ in this action was issued, the plaintiff seeking to restrain the liquidator from parting with the undertaking and assets of the old company to the new without providing for what might be due to the plaintiff under s. 161 of the Act.

On December 3, upon motion for an injunction, an order was made, the plaintiff undertaking on or before December 10 to appoint a person to act as arbitrator on his behalf in fixing the price to be paid for his interest as a dissentient member of the company, and the liquidator undertaking until payment or further order not to part with the assets without setting apart a sum sufficient to answer the plaintiff's claim.

On December 7 the liquidator gave notice that all proceedings under the arbitration must be taken as under protest.

On December 10 the plaintiff appointed an arbitrator on his behalf, and gave the defendants notice of the appointment.

On December 20 the plaintiff gave notice requiring the defendants to appoint an arbitrator on their behalf.

On December 23 the liquidator appointed an arbitrator on behalf of the company and himself, the appointment and all proceedings thereunder being expressly stated to be under protest.

On January 11, 1898, the liquidator gave notice to the arbitrators requiring them to appoint an umpire.

On February 15 the arbitrators appointed an umpire.

On April 30 the umpire made his award, finding that the company should pay to the plaintiff the sum of 100*l.* as the price of his interest, and that the company should pay to the plaintiff the costs of the reference and award.

On May 11 this summons was taken out in the action by the plaintiff for leave to enforce the award. It was adjourned into Court on the terms that the respondents should be at liberty to raise the question of the validity of the award.

Buckley, Q.C., and *Gore-Browne*, for the plaintiff.

Mattinson, Q.C., and *Beddall*, for the respondents. The award cannot be enforced, inasmuch as no case for arbitration has ever arisen. Arbitration is excluded by art. 128, which constitutes an agreement determining the price to be paid for the interest of a dissentient member within the meaning of s. 162 of the Companies Act, 1862: *De Rosaz* v. *Anglo-Italian Bank.* (1) Moreover, having regard to the terms of Sched. I. of the Arbitration Act, 1889 (2), the jurisdiction of the umpire to make the award has never arisen: *Baker* v. *Stephens.* (3)

Buckley, Q.C., in reply. There has been no agreement within s. 162; the agreement there referred to must be between a dissentient shareholder and the company or the liquidator. Art. 128 only constitutes an agreement between the shareholders inter se: *Eley* v. *Positive Government Security Life Assurance Company* (4); *Browne* v. *La Trinidad.* (5) As to the jurisdiction of the umpire, the arbitrators were, by the notice of January 11, "called on to act" within the meaning of Sched. I., clause (*c*), of the Arbitration Act, 1889, and, having made no award within three months of that notice, the jurisdiction of the umpire arose.

Cur. adv. vult.

Aug. 3. STIRLING J., after stating the facts, held that, having regard to the authorities, he could not treat the articles of association as an agreement between a dissentient shareholder and the company, and that consequently the first point taken on behalf of the company and the liquidator failed. His Lordship then continued:—

The second point is this: it is said that the award is bad because the umpire had no jurisdiction. The jurisdiction of the umpire only arises if (1.) the arbitrators declare in writing that they cannot agree; or (2.) the power of the arbitrators has

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(1) (1869) L. R. 4 Q. B. 462.

(2) The Arbitration Act, 1889, Sched. I., clause (*c*), provides: "The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award." Clause (*d*) provides: "If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators."

(3) (1867) L. R. 2 Q. B. 523.

(4) (1876) 1 Ex. D. 20, 88.

(5) (1887) 37 Ch. D. 1.

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expired by effluxion of time. The former event has not occurred; the question is whether the latter has occurred. That turns on the first schedule to the Arbitration Act, 1889.

The arbitrators are to make their award within three months "after entering on the reference, or after having been called on to act by notice in writing from any party to the submission," or within an extended time.

It is not alleged that the arbitrators failed to make their award within three months after entering on the reference or any extended time; but it is said they failed to make their award within three months "after being called on to act by notice in writing," and that is attempted to be made out in this way. On January 11, 1898, notice was served on the arbitrators requiring them to appoint an umpire. Three months from that date expired on April 11, 1898. The award was made on April 30. The question is whether the notice of January 11 is a notice calling on the arbitrators to act within the meaning of the Act. There has been no judicial decision as to the meaning of the words "being called on to act by notice in writing." The meaning of "entering on the reference" was considered in *Baker* v. *Stephens* (1), where it was held that it meant, not merely making an appointment to hear the parties, but actually beginning to hear them, and that an award was made in time if within the time, reckoning, not from the date when the arbitrator accepted the office, or took upon himself the functions of arbitrator by giving notice of his intention to proceed, but from the time when he actually entered into the matter of the reference, either with both parties before him or ex parte under a peremptory appointment properly made. Lord Blackburn says (2): "It is plain, as it seems to me, that entering upon the reference means something else than merely accepting the office. Then if it does not mean merely accepting the office, what does it mean? It is quite possible to construe the phrase so as to suit the defendant's case. Here the arbitrators gave a notice of their intention to proceed peremptorily; and no doubt this was, so far, a step in the reference, and gave them a right to proceed and decide ex parte if both parties did not appear; and it is something like the issuing of a writ; therefore, it might be said that the arbitrators entered on the reference on October 5, in which case, also, the award would be out of time. But the words 'entering on the reference' may also bear the meaning of beginning to hear the parties; and it is very reasonable and proper that time should be given for preparation before proceeding with the reference; frequently, also, a good deal of time is lost before the actual commencement of the business of the reference; and it might very well be that the whole three months might elapse before this, when the parties, or one of them, are unwilling to go on. And on the whole I think the latter is the true construction of the section."

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(1) L. R. 2 Q. B. 523.

(2) L. R. 2 Q. B. 526.

That case does not govern the present, but it throws some light upon the meaning of the section. It seems to me that "called on to act" means, not called on to do some specific thing connected with the arbitration, but called on to enter on the substantial business of the reference. I think, therefore, this objection is well founded, and that the jurisdiction of the umpire had not arisen.

Solicitor for plaintiff: *Seal.*
Solicitors for defendants: *Booth & Smee.*

G. A. S.

STIRLING J.

1898

Oct. 27.

In re SCOWCROFT.
ORMROD *v.* WILKINSON.

[1897 S. 4357.]

Charity—Gift for Political and Religious Purposes.

The vicar of a parish by his will dated in 1897 devised to the vicar for the time being a building used as a village club and reading-room "to be maintained for the furtherance of Conservative principles and religious and mental improvement and to be kept free from intoxicants and dancing":—

Held, a good charitable gift.

THE Rev. James Hamer Scowcroft, vicar of the parish of Bishops Itchington, by his will dated February 20, 1897, provided as follows: "I devise to the vicar for the time being (my successor) and his successors vicars of Bishops Itchington aforesaid the building known as the Conservative Club and Village Reading-room in that village to be maintained for the furtherance of Conservative principles and religious and mental improvement and to be kept free from intoxicants and dancing. I also devise to such vicar and his successors all that freehold land known as Pool Yard and Brothers or Vermin Close and situate in the aforesaid village and containing thirteen and a half acres or thereabouts one moiety of the income thereof to be used by the said vicar for and towards the church expenses (especially the organist's salary) and the other moiety to be used for the maintenance of the aforesaid club and reading-room."

The testator also devised and bequeathed his residuary estate upon trusts for the benefit of an unmarried niece and her unborn children.

The testator died on February 24, 1897.

The site of the building referred to in the will as the Conservative Club and Village Reading-room was purchased by the testator in 1895, and the building was erected by him in 1896. It appears to have been called the Conservative and Village Club-room; but according to the rules of the club its title was simply the Village Club. Those rules provided for parishioners becoming members upon payment of a subscription of a shilling a quarter. Newspapers were supplied, and the room was to be open during certain hours every evening. As a matter of fact, however, the rules did not contain any mention of or reference to Conservative or any other political opinions. In 1894 and 1896 the testator also bought the two closes mentioned in the will, with the intention of settling them upon trusts in connection with the village club-room, but he died before he could carry out that intention.

An originating summons was taken out by the trustees of the will against the vicar of the parish to determine the validity of the above-named devises. The summons was subsequently served upon the Attorney-General.

Stirling J. made an order in chambers declaring the gift for church expenses, especially the organist's salary, to be a valid charitable gift, and he adjourned the rest of the summons into court.

F. Stallard, for the summons. A gift for the furtherance of Conservative principles is not a good charitable gift, as the furtherance of the political opinions of one party only cannot be regarded as being for the benefit of the public generally. Here it is impossible to say how much is to be devoted to the advancement of the Conservative cause, and how much to religious and mental improvement; and in such a case, where one of the purposes is not charitable, that vitiates the gift. This reasoning applies to the second devise as well as to the first. Nor can these devises be supported as gifts for the foundation and maintenance of a club since that has been held to be not a charitable object. If these gifts are not charitable, they are void for remoteness.

Ingle Joyce, for the Attorney-General. A bequest for any religious purpose is good, and is not vitiated by being associated with or intended to promote any particular views, unless they be illegal or immoral. Thus the Courts have upheld gifts for the promotion of the Roman Catholic religion: *West* v. *Shuttleworth* (1); for the Irvingites: *Attorney-General*

(1) (1835) 2 My. & K. 684.

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v. *Lawes* (1); for the promotion of Evangelical religion: *In re Hunter* (2), which, however, is under appeal to the House of Lords. In *Thornton* v. *Howe* (3), an extreme case, Lord Romilly held that a bequest for the publication of the sacred writings of Joanna Southcote was a valid charitable bequest if given out of pure personalty, stating that the Court made no distinction between one religion and another, or between the tenets of one sect and another, unless they were adverse to all religion or subversive of all morality. In *In re Delmar Charitable Trust* (4) the bequest was for the maintenance and defence of the doctrines of the Reformation and of civil and religious liberty against the advance of Popery, and was supported.

There is a similar rule with respect to gifts for the advance or increase of knowledge. In *Thompson* v. *Thompson* (5) a bequest for the assistance of a literary person who was to extend the knowledge of particular doctrines in literature was upheld, the doctrines being consistent with religion and morality. In *Russell* v. *Jackson* (6), the trust being for the foundation of a Socialist school, an inquiry was directed as to what the doctrines of Socialism were, with a view to ascertaining whether they involved anything contrary to religion or morality. Why, then, should not a bequest for the furtherance of Conservative principles for the promotion of political knowledge in connection with those principles, or for the maintenance of the principles of order and good government against the advance of anarchy (see *In re Delmar Charitable Trust* (4)), be a good charitable gift?

This, however, is not a mere gift for the furtherance of Conservative principles: it is for Conservative principles and religious and mental improvement, or, in other words, for religious and mental improvement in connection with Conservative principles which are neither irreligious nor immoral. Therefore, the association of these principles with religious and mental improvement does not vitiate the gift any more than the association of the views of any particular sect or school

(1) (1849) 8 Hare, 32.

(2) [1897] 2 Ch. 105.

(3) (1862) 31 Beav. 14.

(4) [1897] 2 Ch. 163.

(5) (1844) 1 Coll. 395.

(6) (1852) 10 Hare, 204.

with a bequest for a religious or literary purpose would invalidate such a gift. Looking at the substance of the gifts in the present case, and bearing in mind the prohibition of intoxicants and dancing, it is submitted that the gifts in question are really and principally for the mental and moral improvement of the villagers, and, not being invalidated by the tinge of Conservative principles, are good and valid charitable gifts.

Clode, for the vicar of the parish.

Stallard, in reply.

STIRLING J. The question on this summons is as to the validity of two gifts. That depends on whether they are charitable or not. The first is a devise to the vicar for the time being and his successors, vicars of Bishops Itchington, of a building known as the Conservative Club and Village Reading-room in that village, to be maintained "for the furtherance of Conservative principles and religious and mental improvement and to be kept free from intoxicants and dancing." The first question is what is the true construction of that gift. It is said that it is a gift of a building to be maintained either for the furtherance of Conservative principles, or for the furtherance of religious improvement, or for the furtherance of mental improvement, and that a gift for the maintenance of Conservative principles is not a good charitable gift. Whether or no a gift for the furtherance of Conservative principles is a good charitable gift is a question upon which I do not think it necessary to express any opinion in this case, because it seems to me that the reading which is suggested is not the true one, but that this is a gift for the furtherance of Conservative principles and religious and mental improvement in combination. It is either a gift for the furtherance of Conservative principles in such a way as to advance religious and mental improvement at the same time, or a gift for the furtherance of religious and mental improvement in accordance with Conservative principles; and in either case the furtherance of religious and mental improvement is, in my judgment, an essential portion of the gift. It is, therefore, a gift in one form

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or another for religious and mental improvement, no doubt in combination with the advancement of Conservative principles; but that limitation, it appears to me, is not sufficient to prevent it from being a perfectly good charitable gift, as undoubtedly it would be if it were a gift for the furtherance of religious and mental improvement alone. I think that that construction is aided by the direction which follows, which is that the building in question is to be kept free from intoxicants and dancing.

It occurs to me that possibly the whole matter may be viewed in another way, namely, that this is a devise of a building for the public benefit, and that it may be supported on that ground just as the gift of a library or museum would be held to be a good charitable gift. However that may be, I think that all three objects are intended to be advanced simultaneously by this gift, and it seems to me a good charity.

Then the other gift is a devise also to the vicar and his successors of certain pieces of freehold land situate in the village—"one moiety of the income thereof to be used by the said vicar for and towards the church expenses especially the organist's salary"—that has already been held to be a good charitable gift, and that there is no question about—"and the other moiety to be used for the maintenance of the aforesaid club and reading-room." It is said that that is for the maintenance of the club and reading-room as it existed at the death of the testator; but it seems to me that that is not the true construction of the will, but that the money is to be used for the maintenance of the building which the testator had directed to be maintained for the furtherance of Conservative principles and religious and mental improvement. In my judgment, therefore, both gifts are good.

The order was as follows:—

Declare both devises to be good and charitable gifts; direct a proper scheme to be settled; extend the time limited for sale under the Mortmain and Charitable Uses Act, 1891, till after January 18, 1899. Costs of all parties—applicants as between solicitor and client—to be paid out of the residue. Liberty to apply.

Solicitors: *Field, Roscoe & Co., for Wood & Bourne, Southam; Treasury Solicitor.*

H. B. H.

In re PARKER-JERVIS.
SALT *v.* LOCKER.

[1898 P. 1129.]

KEKEWICH J.
1898
Aug. 4, 5.

Inland Revenue—Estate Duty—Settlement—Jointure—"Without any deduction whatsoever"—Assessment of Duty—Limited Owner—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*); *s.* 4; *s.* 7, *sub-s.* 7; *s.* 8, *sub-s.* 4; *s.* 9, *sub-ss.* 1, 5, 6, 7; *s.* 14, *sub-s.* 1.

Under a settlement made by a father and son on the marriage of the latter, an estate was limited to certain uses in strict settlement, including a limitation of a jointure of 1000*l.* a year to the wife, A., in case she survived both father and son, which event happened, such jointure to be paid to her "without any deduction whatsoever except in respect of income tax." The father, by a subsequent settlement made on his second marriage, appointed, under a power in the former settlement, a jointure of 500*l.* a year to his wife, B., if she survived him, which event happened, and charged the same upon the settled estate, but there were no words of exemption as in the case of the 1000*l.* jointure.

Upon the father's death both jointures became payable.

Held, as to A.'s jointure, that she was not herself liable to pay the estate duty upon it, or any interest on such duty, since the words "without any deduction, &c.," constituted a contract of exemption and also amounted to an "express provision to the contrary" within s. 14, sub-s. 1, of the Finance Act, 1894:

Held, as to B.'s jointure, that she must be treated as tenant for life of a sum equivalent to the capitalized value of the jointure, to be ascertained at the same number of years' purchase as the estate as a whole was capitalized for the purpose of duty; and that she must be charged with estate duty on that sum, but was entitled to throw the duty charged against her upon the corpus of the estate, on the terms of her paying interest to the tenant for life or in tail or in fee in possession at the rate actually paid to the Commissioners of Inland Revenue until payment of the duty, and thereafter at the rate at which the duty could be raised by mortgage of the estate.

Under the Finance Act, 1894, the estate duty on an estate passing on a death is chargeable on the estate as a whole, without regard to tenancies for life or other particular interests, the scheme of the Act being that the duty shall be levied on the inheritance and that the inheritance shall bear it.

ADJOURNED SUMMONS.

By a settlement dated December 10, 1861, executed on the marriage of Edward John Parker-Jervis with Grace Catherine

Jervis, spinster (and made in exercise of a joint power of appointment given to E. J. Parker-Jervis and his father Edward Swynfen Parker-Jervis, by a previous disentailing deed and resettlement, dated March 27, 1861), an estate called the Stone Aston estate was conveyed by the father and son to the use of trustees for a term of eighty years for securing to Grace C. Jervis, in the event (which happened) of her surviving E. J. Parker-Jervis, an annuity of 800*l.* during the joint lives of herself and E. S. Parker-Jervis, with remainder to the use of E. S. Parker-Jervis for life, with remainder to the use that, in case Grace C. Jervis should survive both E. S. Parker-Jervis and E. J. Parker-Jervis (which event happened), she should during her life receive a jointure of 1000*l.* per annum, to be paid to her "without any deduction whatsoever except in respect of income tax," with remainder to trustees for two hundred years for securing such jointure, with remainder to trustees for five hundred years (which latter trustees were also appointed the general trustees of the settlement) upon trust to raise 10,000*l.* for portions for younger children of the marriage, with remainder to the use of the first son of the marriage in tail male, with divers remainders over. And the settlement contained power for E. S. Parker-Jervis, the father, in case he should survive his first wife (which happened), to appoint a jointure of 1000*l.* per annum to any future wife. The plaintiffs were the trustees of the five hundred years' term and generally of the settlement.

Edward John Parker-Jervis, the son, died on July 31, 1868, in the lifetime of his father, leaving his widow, Grace C. Parker-Jervis, one son, Edward St. Vincent Parker-Jervis, and four daughters. The widow afterwards married William Thomas Locker, who died in 1885 leaving his widow surviving him.

By a disentailing deed and resettlement dated November 14, 1884, made between Edward Swynfen Parker-Jervis of the first part, Edward St. Vincent Parker-Jervis, who had just attained twenty-one, of the second part, Mrs. Locker and her husband of the third part, and the plaintiffs of the fourth part, the Stone Aston estate and another estate called the Little Aston estate were settled (subject as to the Stone Aston estate to Mrs. Locker's annuity of 800*l.* and jointure of 1000*l.*) to certain uses in strict settlement, including a limitation in remainder to the use of Edward St. Vincent Parker-Jervis for life, with remainder to his first and other sons successively in tail male; and the settlement contained powers for Edward Swynfen Parker-Jervis to appoint to a future wife (his first wife having died on June 24, 1884) a jointure of 500*l.* per annum, and to charge the estates with 10,000*l.* as portions for present or future children, which powers were to be substituted for the powers of jointuring and charging contained in the settlement of December 10, 1861, which powers E. S. Parker-Jervis thereby released.

A sum of Consols was by that deed of resettlement assigned to the plaintiffs upon the same trusts as if they were capital moneys under the Settled Land Act, 1882. The plaintiffs were also appointed trustees of the resettlement for the purposes of the Settled Land Acts, and generally.

By a settlement dated July 10, 1886, made on the marriage of Edward Swynfen Parker-Jervis with his second wife, the defendant Maud Parker-Jervis, he appointed a jointure of 500*l.* per annum to her in case she survived him, and charged the same upon the whole of the estates settled by the deed of November 14, 1884, and he also charged the estate with 10,000*l.* as portions for children.

On January 3, 1896, Edward Swynfen Parker-Jervis died, having under his power by his will charged the estates with 10,000*l.* as portions for two of his children by his first marriage. He had no children by his second marriage.

By a deed of February 20, 1896, the Reversionary and General Securities Company, who were mortgagees of the life estate of E. St. Vincent Parker-Jervis, granted and assigned the lands and hereditaments subject to the uses of the settlement of November 14, 1884, to the defendant John Saltren Willett, for a term of one hundred years from the day next before the day of the death of Edward Swynfen Parker-Jervis, if Edward St. Vincent Parker-Jervis should so long live, freed from all right or equity of redemption by E. St. V. Parker-Jervis. The defendant J. S. Willett subsequently mortgaged his interest in the settled estates to the defendants the University Life Assurance Society.

Upon the death of Edward Swynfen Parker-Jervis, the Commissioners of Inland Revenue claimed estate duty under the Finance Act, 1894, in respect of all property comprised in the resettlement of November 14, 1884, as passing upon his death, without allowing any deductions. The 10,000*l.* portions for children had been raised, and paid, less estate duty, and no question arose as to them. As the jointure of Mrs. Locker arose under a disposition not made by Edward Swynfen Parker-Jervis—namely, under the settlement of December 10, 1861—the value of such jointure was treated by the commissioners as an estate by itself, and was assessed by them as of the value of 24,670*l.*, on which duty at 4 per cent., with interest, was assessed. The 24,670*l.* was arrived at by capitalizing the jointure at the same number of years' purchase—that is, between twenty-four and twenty-five years' purchase—at which the rental of the Stone Aston estate had been capitalized for the purpose of duty. Estate duty at 7 per cent. was assessed upon the whole of the rest of the estate. It was proposed that the estate duty should be raised by mortgage of the settled estates or part thereof, and the question arose as to how the burden should be borne between the persons interested.

Accordingly, on May 18, 1898, the trustees of the settlement of December 10, 1861, and of the resettlement of November 14, 1884, took out this summons, under s. 14, sub-s. 2, of the Finance Act, 1894, against Mrs. Locker, Mrs. Maud Parker-Jervis, J. S. Willett, the University Life Assurance Society, and St. Vincent John Parker-Jervis, an infant, the eldest son of Edward St. Vincent Parker-Jervis, asking—

(1.) Whether they had power under s. 9, sub-s. 5, of the Finance Act, 1894, to raise the amount of the estate duty payable on the death of Edward Swynfen Parker-Jervis in respect of Mrs. Locker's jointure of 1000*l.* by a mortgage of the settled estates or part thereof, notwithstanding that such jointure had been treated for the purposes of estate duty as an estate by itself and had not been aggregated with any other property passing on the death of Edward Swynfen Parker-Jervis:

(2.) How the estate duty payable in respect of that 1000*l.* jointure should be borne as between the persons interested in the Stone Aston estate, and in particular whether such duty ought to be repaid by Mrs. Locker to the plaintiffs or other persons paying the same, or whether she ought to pay interest upon the amount of it to the defendant Willett or the defendant society, and if so at what rate:

(3.) How the proportion of estate duty payable on the death of Edward Swynfen Parker-Jervis in respect of the estates comprised in the resettlement of November 14, 1884, to be borne by the defendant Mrs. Maud Parker-Jervis as being entitled to the jointure of 500*l.*, should be determined: and

(4.) Whether Mrs. Maud Parker-Jervis would be entitled to charge the proportion of estate duty to be borne by her as aforesaid upon the corpus of the estate, and, if so, upon what terms as to interest and otherwise.

J. Austen-Cartmell, for the plaintiffs, the trustees. As to the first question, the trustees have considered themselves to be accountable for the duty on the whole estate under s. 8, sub-s. 4, of the Finance Act, 1894, and they desire to know how they may raise it. (1)

(1) The various sections of the Finance Act, 1894, referred to in the course of the arguments are as follows:—

Sect. 2, sub-s. 1: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—. . . . (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest. . . ."

Sect. 7, sub-s. 7: "The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall (*a*) if the interest extended to the whole income of the property, be the principal value of that property; and (*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended."

Sect. 8, sub-s. 4: "Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, *A. H. Jessel*, for the defendant Willett, the assignee of the tenant for life. It might be imposing a serious responsibility upon trustees who are in this position to hold them accountable for the whole of the duty. They are only trustees of a term to raise portions. The 8th section, sub-s. 4, says that the trustee is only liable " to the extent of the property actually received or disposed of by him." It is upon the legal tenant for life that the privilege of paying the duty devolves; and the man who pays has a charge upon the property by virtue of s. 9, sub-s. 6. We are willing to let the trustees raise the money on our behalf.

[KEKEWICH J. I think the plaintiffs and Mr. Jessel's client as tenant for life are both accountable; but it will be better to leave the question open, and in answer to the first question asked by the summons, to declare that Mr. Jessel's client as

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and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property. . . ."

Sect. 9, sub-s. 1: "A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable. . . ."

Sub-sect. 5: "A person authorized or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof."

Sub-sect. 6: "A person having a limited interest in any property, who pays the estate duty in respect of that property, shall be entitled to the like charge, as if the estate duty in respect of that property had been raised by means of a mortgage to him."

Sub-sect. 7: "Any money arising from the sale of property comprised in a settlement, or held upon trust to lay out upon the trusts of a settlement, and capital money arising under the Settled Land Act, 1882, may be expended in paying any estate duty in respect of property comprised in the settlement and held upon the same trusts."

Sect. 14, sub-s. 1: "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorized or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property, (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary."

tenant for life has power to raise the amount of the estate duty in respect of the jointure of 1000*l.*]

J. Austen-Cartmell. On the question of the incidence of the estate duty, and the apportionment between the tenant for life and the annuitants, that has to be determined under s. 14, sub-s. 1, of the Act. (1) A rateable part of the estate duty, by whomsoever paid, can be recovered from the annuitants; and the question is how that is to be assessed, whether by actuarial valuation of the annuity, having regard to the annuitant's age, or whether the annuitant should be treated as tenant for life of so much of the estate as would produce an annuity of such an amount, and then that interest should be paid by such annuitant on so much of the duty as would be properly attributable to that part of the property. It is conceived that the annuitant, if charged with duty, would have a charge under s. 9, sub-ss. 1 and 7, in respect of such duty. The other section bearing upon this question is s. 2, sub-s. 1 (*b*), of the Act, and by that section, combined with s. 7, sub-s. 7 (*b*), it would seem that the latter of the two methods of arriving at the amount of duty to be paid is the more correct, as it is the more equitable one. The general view of the Act appears to be that a limited owner is not to pay the duty, which is thrown on the whole estate, but is chargeable only with the interest on the duty apportioned in respect of his limited ownership. So the annuitant here will only have to keep down the interest on the charge.

R. Hughes, for the defendants Mrs. Locker and Mrs. Maud Parker-Jervis. With regard to Mrs. Locker, whose jointure of 1000*l.* is charged on the Stone Aston estate alone, she is exempted from the payment of all duty by reason of the express words in the settlement of December 10, 1861, "without any deduction whatsoever except in respect of income tax." This estate duty is a "deduction." There can be no other possible deductions except this duty, and there must have been some such duty or tax in the mind of the person giving this jointure. In the recent case of *In re Saunders* (2), before the Court of Appeal, there was a gift of sufficient stocks to raise

(1) Ante, p. 648.

(2) [1898] 1 Ch. 17.

the "net sum of 2000*l.*," and it was held that the person entitled took the fund free from succession duty. In his judgment the Master of the Rolls said, when referring to the case of *Banks* v. *Braithwaite* (1) (which had so much pressed upon Stirling J. in the Court below), that he would not have construed the words "clear yearly income" in that case in the same way in which Kindersley V.-C. had done. The words in the present case are much stronger, for there is to be no deduction whatever. Then in the alternative, as to Mrs. Locker's jointure, and in any event as to Mrs. Maud Parker-Jervis's jointure of 500*l.* created by the settlement of 1886, interest only is payable on the corpus of the rents which go to provide the annuity. The Finance Act imposes the duty upon the whole estate. If Mrs. Parker-Jervis is bound to pay duty, then by s. 9, sub-s. 6, she would be entitled, as "a person having a limited interest, who pays the estate duty in respect of that property," to have a charge upon the estate in respect of it. When the duty is paid it frees the estate altogether, both limited interest and reversion. The person who gets the income during the limited interest bears the duty as long as he gets the income, and the person who is entitled to the corpus bears the duty when he gets the corpus. That is a perfectly equitable arrangement. The actuarial arrangement for arriving at the proper amount of duty is hazardous—it may be equitable or it may not, and at best it is only a rough-and-ready way of carrying it out. If Mrs. Parker-Jervis is therefore to be charged, she should only pay the interest on a due proportion of the charge during her life.

A. H. Jessel, for the defendant Willett, the assignee of the tenant for life. This duty is not a "deduction" within the meaning of the settlement. It was not known in 1861, at the time when the settlement was made, and in order to bring it within the concluding words of s. 14, sub-s. 1, it must have been "expressly" mentioned. There is no "express provision to the contrary." At most it is an exemption by implication. Words might have been inserted to meet the case, but here the actual words are not wide enough. The commissioners have assessed the amount payable in respect of her jointure at 1000*l.*, and this should be paid by Mrs. Locker.

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(1) (1862) 32 L. J. (Ch.) 35.

S. R. Earle, for the defendant St. Vincent John Parker-Jervis, the infant tenant in tail in remainder. Neither of these jointures are given free of estate duty. The exact case of a jointure does not appear to be dealt with by the Finance Act, but the Act intended the beneficiary to pay the estate duty: *In re Countess of Orford.* (1) There is also the case of *In re Meyrick.* (2)

Before the Finance Act, 1894, there were several decisions upon the words "free from all deductions" or similar words, where the recipient was held not to be exonerated from income tax, such as *Gleadow* v. *Leetham* (3), and the cases collected in Vaizey on Settlements, pp. 923–925. No doubt estate duty cannot be said to be analogous to income tax. The words in the settlement are not sufficient to free the jointure from estate duty.

F. Stallard, for the defendants, the University Life Assurance Society, the mortgagees of the life estate.

KEKEWICH J. There are two questions to be decided, both arising under the Finance Act, 1894, but otherwise of an entirely different character, even although they both concern annuities, and those annuities are jointure rent-charges.

I will deal first with the question whether Mrs. Locker is entitled to be paid her annuity or jointure free from any deduction in respect of the estate duty leviable on the property out of which that annuity is payable, and on which it is charged. That question stands entirely alone.

Without for the moment looking at any authorities or referring to the Finance Act, let me consider the contract between the parties, because this settlement is a contract whereby an annuity is charged in the proper form on the estate for the benefit of Mrs. Locker, who is a contracting party. If the parties have said in so many words that the annuity is to be paid free of any charge whatever—that is to say, if the owner

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(1) [1896] 1 Ch. 257.
(2) [1897] 1 Ch. 99.
(3) (1882) 22 Ch. D. 269.

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of the property who charges it with the annuity has contracted that 1000*l.* shall come to the hands of the person in whose favour he makes the charge—it is rather startling to be told that the contract shall not take effect, and that some deduction shall nevertheless be made, and that the person entitled to the charge shall not receive 1000*l.*, but something less. Many persons entitled to annual or quarterly sums think, no doubt, that they are going to receive those sums in full, but do not so receive them because the revenue makes certain deductions. Income tax has to be paid, and all the decisions as regards income tax have gone upon this footing, that although it is possible to provide for the payment of an annuity clear of income tax, it has to be done by somewhat cumbersome machinery, and you have to provide that, in addition to the annuity which was necessarily chargeable with the income tax, there should be also raised a further annuity equivalent to the income tax, but of course a varying amount, according as the income tax rises or falls. Some contract of that sort must be entered into if it is desired that an annuitant should receive his annuity without any deduction for income tax. But those decisions have never been extended to taxes of any other kind whatever, so far as I am aware: it has never been said that other taxes are not "deductions," though by some legal interpretation it has been held again and again that income tax is not a "deduction." I see that Page-Wood V.-C., in the case of *Turner* v. *Mullineux* (1), which is quoted by Kay J. in the case of *Gleadow* v. *Leetham* (2), says that "this Court always holds that income tax is not a deduction." It really is not, in one sense, because it is a sum which is paid by the person entitled to the annuity, and paid in respect of the income which he receives. It is not really chargeable until he receives the income. In that sense it is logically and technically not a deduction. Every other tax that prevents the annuity coming into the hands of the annuitant clear has always been held, so far as I am aware, to be a deduction.

Turning to this settlement, I find that the parties have contracted that Mrs. Locker is to be paid this 1000*l.* a year

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(1) (1861) 1 J. & H. 334.

(2) 22 Ch. D. 269.

"without any deduction whatsoever except in respect of income tax." There is no attempt to make it clear of income tax; and not only that, there not being any desire to make any such exemption, the usual words are put in the settlement. Then it is said that clause does not refer to the estate duty, because that is not a "deduction." It is unnecessary to say more upon that point than I have already said. But then it was urged that this was a settlement made in the year 1861, and it was impossible that the contracting parties should have contemplated such a charge as estate duty, which was imposed more than thirty years afterwards. It is a sufficient answer to that to say that the parties did not contemplate that or any other duty. What they did contemplate was that the annuity should be paid without any deductions whatever. I think it is only fair to say that they must be taken to have contemplated some possible deduction for tax, because they have excepted deductions in respect of income tax, which shews that some deductions for tax were in their minds. But one need not dwell much upon that, because they have contracted for the annuity to be paid without any deduction whatever; and if the argument prevails that Mrs. Locker is to take 1000*l.* a year less some sum to be ascertained for the estate duty, she will not get 1000*l.* a year, but 1000*l.* a year less some sum in respect of the estate duty. That seems to me not to be in accordance with the contract. Here I have these single words, "without any deduction whatsoever," and I think that means, on the contract, that there was to be no deduction, in the events which have happened, in respect of the estate duty.

But then I am told that, apart from the contract, the Act is against my interpretation; and that depends upon s. 14, which I will not read at length, but which provides that where the person who pays the duty pays the whole, then he may recover "from the person entitled to any sum charged on the property" a rateable part—that is, the proper proportion which the person owning the charge ought to provide; but that must be under a disposition "not containing any express provision to the contrary." I am told that this clause, "without any deduction whatsoever," is not an "express provision to the contrary." It is not express, no doubt, in the sense which I mentioned, and which was argued as being the right one, that there is no express mention of the estate duty, and there could not be, because of the date. But I see no difficulty myself in saying that an "express provision" is that which expressly provides against any deduction, fairly including the one in question; and it is not necessary to say that there must be an express provision as regards estate duty. If the argument is sound, no settlement dated before the passing of the Finance Act, or, at any rate, before it was made known to the public that the estate duty was contemplated by Parliament, could possibly contain an express provision, because it would have been impossible before the Act was passed by Parliament to frame words which would expressly mention the estate duty which was afterwards imposed. Reference has been made to an example given in Mr. Austen-Cartmell's book on the Finance Acts at p. 86, as if it applied. In one sense it does apply. The example there given is a simple one. I agree it is directly applicable to the case in hand until you come down to the words "under a disposition not containing any express provision to the contrary." The author has not ventured to say what is equivalent to an "express provision to the contrary."

The other point is a very much more difficult one. It is obvious that we are dealing with the question how the duty chargeable to the jointress is to be ascertained. That is a question which has not been dealt with, and probably did not occur to the framer of the Act in its full difficulty, and therefore we have no provision directly dealing with it. All one can do is to see what was the intention of the Legislature, having regard to the general scheme of the Act, and to those special provisions which at all bear upon it. With regard to the jointure of Mrs. Maud Parker-Jervis, with which alone I am now dealing, the question is this, With what duty is she to be charged? She must be charged with some—that is to say, some deduction must be made in respect of her duty. It is practically immaterial for this purpose whether the duty is charged on the whole or any part of the estate. I do not wish to incumber my view of the case with any distinction on that ground.

The first point which occurs to me to guide me is this—that the estate duty is, by the Act, charged on the property. It is quite unnecessary to go through the Act for the purpose of shewing that. It is the property which, as a whole, passes by the death that is charged with the estate duty. The Legislature does not concern itself, as between the owner of the estate, the taxpayer, and the taxed property, with any question arising between that taxed property and the different persons interested in it, for the purpose of ascertaining what is to be paid to the revenue. The Legislature takes the estate as a whole passing on the death, and says that property, whatever it is, shall be charged with duty at a certain rate. On that principle the duty is ascertained, and it has to be paid by some person. It is immaterial whether it has to be paid by the tenant for life. Then, not for the sake of the revenue at all, which is already thoroughly protected, but for the sake of assisting different persons to bear their own burdens in the proper rateable proportions, the Act contains several provisions distributing those burdens.

Mrs. Maud Parker-Jervis is entitled to a jointure of so much, chargeable on the estate, the whole of which is chargeable with the duty. One very ready way of ascertaining her proportion is to say, "You are entitled to a jointure of 500*l*. a year, payable, it may be, out of property which realizes more than that, and you must bear the burden in exact proportion to the capital value of your jointure. The duty is charged on the capital value of the whole. You are entitled to something which, though it is an annual charge of a limited duration, is yet capable of valuation by the simplest means—namely, by an actuarial assessment, and you must pay the duty on that." Of course, for many purposes, the actuarial assessment is the very best possible mode of valuation, and if you apply it to a very large number of cases so as to strike an average, it would, on that average, work with very great fairness. There is no doubt about that; but the question is whether that ought to be applied to a case, which is one of a large number of cases, where neither party can possibly have the benefit of the average. It is all very well to say that if you take a score or fifty or a hundred jointresses, and assess their jointures on that principle, they would not between them pay too much or too little, but would pay really exactly what they ought to pay; but it is another thing to say that Mrs. Maud Parker-Jervis will or will not pay too much. It is quite possible that she may pay a great deal too much—I mean much more than is a fair and reasonable proportion attributable to her interest. On the other hand, if she lives to an old age, it is quite possible that she may have an advantage and pay too little; but that seems to me so problematical, so speculative, that I ought not to adopt it if there is any other possible view.

There is another possible view, and I think, on the whole, it is a reasonable one, and one which I ought to adopt. I do not propose to go through the different sections of the Act. They will have, no doubt, to be construed again and again before we get to an exact interpretation of them; but it seems to me tolerably clear that this lady is entitled to a charge on the estate for the duty which she pays; and that whatever part of the duty she, or anybody else, pays, is, by the Act, imposed on the estate, and is payable out of the inheritance. If she is liable to pay the duty in the first instance on the whole, she is entitled to a charge for what she pays. That seems to me to be so, applying the 9th section. She is in the position of a person having a charge on the estate. In respect of that charge duty will have to be paid. She is entitled, so it seems to me, to say, "You charge that duty on the whole estate, and so far as I am a mortgagee, though of a limited character, I must keep down the interest on that charge. I shall only do it during my life—it may be a short time, or a long time." Then the answer to that is, "Yes, but on your death there will be nobody left to pay that interest, and the result will be that it will have to be borne by the inheritance—it may be by a tenant for life in possession, or by a tenant in tail; but practically, in legal language, it will have to be borne by the inheritance." That is quite fair, and I think that is exactly in accordance with the scheme of the Act, which is that the duty shall be levied on the inheritance, and the inheritance shall bear it. I think it would be going contrary to the general scheme if I were to say that any part of the duty as a whole on the capital sum ought to be borne by any person having a limited interest. No doubt, in one sense, every person having a limited interest bears a proportion of the duty. He bears it in proportion to his limited interest. The tenant for life unfortunately is perfectly aware he bears a heavy burden. He bears it in this way, that instead of having the clear income which his predecessor had—I am speaking, of course, of estates free from incumbrances—he has it less a charge on the property which has to be raised by mortgage or otherwise; and the result is that he has to pay his 4 per cent., or whatever it is, on that charge during his life. If the property is sold he has less income from the property. If it is paid out of capital money there is a cesser of interest arising from that capital money, but in either case the burden of the duty is cast upon the inheritance. If the view which I take is the right one, and this lady has to bear her proportion of the duty during her life, the same result will follow. The inheritance, for this purpose, may be taken to be the tenant for life in possession, and the jointress, both of them being limited owners. The jointress will pay interest on the sum ascertained according to her rateable proportion of the entire property. The rest will be that of which the tenant for life remains in possession, and he will have to pay interest on the sum charged on that proportion, and so during the joint lives they will divide the charge in a fair way. If she dies first, he will pay the interest on the whole. That seems to me to be the scheme of the Act; the different clauses referred to all seem to me to point that way, and I have not seen any clause which in the slightest degree contradicts it. I repeat there is no provision in the Act to that effect—it seems to have been left very much at large; but I have to consider how best to ascertain the fair proportion of the duty which the jointress must bear. I think that is the way to do it. We know here what the total value of the estate is. The proportion of the inheritance of the whole estate which is required to pay the duty on this jointure—that

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is to say, so much of the estate as is represented by the jointure must be therefore ascertained. The duty on that sum will be either actually raised on mortgage or considered to be so raised. It may be paid by appropriation of capital money. The jointress must pay interest on that sum at a fair rate, and I suppose the proper way would be that she should pay 4 per cent. on the charge.

J. Austen-Cartmell. Part of the money is going to be raised at 3$\frac{1}{8}$ per cent., and the rest taken out of the capital money in the hands of the trustees.

KEKEWICH J. Then she will pay interest at 3$\frac{1}{8}$ per cent. There will therefore be a declaration that the duty payable in respect of the annuity of 1000*l.* is to be borne by the estate as a whole, and that Mrs. Locker is not liable to contribute any part of such estate duty or interest thereon. And there will be a declaration that Mrs. Maud Parker-Jervis is to pay 3$\frac{1}{8}$ per cent. upon so much of the duty as is attributable to the value of the 500*l.* annuity at the number of years' purchase adopted by the Inland Revenue Office in assessing the duty on the whole estate.

I will answer the several questions as follows: As to the first question, I decline to answer it specifically, but I will direct that the plaintiffs do raise so much of the estate duty on the whole of the estates, including Mrs. Locker's jointure of 1000*l.*, as they think fit, out of the Consols; the residue of the duty to be raised by Captain Saltren Willett, as tenant for life, by mortgage of the Little Aston estate on the request of the plaintiffs. As to the second question, there will be a declaration that Mrs. Locker is not liable to pay any estate duty or any interest thereon. As to the third question, there will be a declaration that Mrs. Maud Parker-Jervis is to be treated as tenant for life of a sum equivalent to the capitalized value of her jointure of 500*l.* at the same number of years' purchase as the estates as a whole are capitalized for the purposes of duty, and that she be charged with estate duty on such sum. As to the fourth question, there will be a declaration that Mrs. Maud

Parker-Jervis is entitled to throw the sum upon which duty is to be charged against her upon the corpus of the estates, upon the terms of her paying interest to the tenant for life or in tail or in fee in possession at the rate actually paid to the commissioners until payment of the duty, and thereafter at the rate at which the duty can be raised by mortgage. Tax the costs of all parties as between solicitor and client; such costs, when taxed, to be paid out of the Consols.

Solicitors: *Stuart & Tull; Waltons, Johnson, Bubb & Whatton; J. E. Lickfold.*

G. I. F. C.

ROMER J.

1898

Aug. 4, 10.

In re FISHER AND GRAZEBROOK'S CONTRACT.

Vendor and Purchaser—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 22—*Sale by Tenant for Life—Trustees for the Purposes of the Act—Payment of Money into Court—" Option."*

Sect. 22 of the Settled Land Act, 1882, which confers on a tenant for life the option of capital money arising under the Act being paid either to the trustees of the settlement or into court, presupposes that there are trustees for the purposes of the Act in existence.

Therefore, where a vendor selling as tenant for life enters into a contract for the sale of settled land, he cannot, under s. 22, require the purchaser to pay the purchase-money into court where no trustees for the purposes of the Act are in existence when the time comes for the completion of the contract, and the contract will not be enforced.

Where, however, a purchaser pays his purchase-money into court in ignorance of the fact that there are no trustees in existence, he will get a good title.

Summons under the Vendor and Purchaser Act, 1874, for the determination of a question arising under s. 22 of the Settled Land Act, 1882.

In March, 1898, Fisher entered into a contract with Grazebrook for the sale of a freehold house forming part of the residuary estate of William Hayes, and to which Fisher was entitled in fee subject to an executory gift over in the event of his death without issue.

Fisher had contracted to sell as a person having the powers of a tenant for life.

On examining the title the purchaser's advisers took the objection that there were no trustees within the meaning and for the purposes of the Settled Land Acts, and that the purchaser was bound to see that at the time of completion at least such trustees were duly appointed. The vendor's advisers contended that whether there were such trustees or not, and even if the purchaser knew there were no such trustees, yet if the purchase-money was paid into court in accordance with the provisions of s. 22 of the Settled Land Act, 1882, the purchaser would get a good title.

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The vendor insisting on the purchase being carried out without trustees being appointed, and the purchaser objecting, this summons was taken out by the vendor for a declaration that a title in accordance with the contract had been shewn, and that the purchaser on paying the purchase-money into court under the provisions of the Settled Land Acts, 1882 to 1890, would obtain a good discharge for the same.

W. B. Coltman, for the vendor. The purchaser will get a good title if he pays the purchase-money into court in pursuance of s. 22 of the Act of 1882.

H. D. Grazebrook (the purchaser), in person. Sect. 22 presupposes the existence of trustees. I contend that I am not bound to take the title unless trustees are appointed for the purposes of the Acts. The "option" referred to in s. 22 can only be exercised when there are trustees for the purposes of the Act in existence: *Hatten* v. *Russell* (1); *Mogridge* v. *Clapp.* (2) [He also referred to *Wheelwright* v. *Walker* (3) and *Hughes* v. *Fanagan.* (4)]

Coltman, in reply.

Romer J. In my opinion the application fails. The Settled Land Act certainly contemplated that there should be trustees for the purposes of the Act in existence at the time when the tenant for life sells, and it was decided in *Wheelwright* v. *Walker* (3) that a tenant for life selling in the absence of such trustees can be restrained from so doing. In this case the contract for sale is undoubtedly good although there are no trustees; but when the time arises for the contract to be completed, and the purchaser wants to get a good discharge for his purchase-money, he finds that there are no trustees in existence. The vendor, the tenant for life, then requires him to pay his money into court under s. 22 of the Act, and to take a conveyance. In my opinion the tenant for life is not entitled to require under these circumstances the purchaser to do so. Sect. 22, which provides for payment into court of the

(1) (1888) 38 Ch. D. 334.
(2) [1892] 3 Ch. 382.
(3) (1883) 23 Ch. D. 752.
(4) (1891) 30 L. R. Ir. 111.

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purchase-money, presupposes the existence of trustees. That was decided in *Hatten* v. *Russell* (1), where Kay J. points out (2) "that that option cannot properly be exercised, and cannot really be exercised at all, if there are no trustees." The same point arose in the case of *Mogridge* v. *Clapp.* (3) In that case again Kay L.J. says (4): "By s. 22 capital money arising under the Act must be paid to the trustees, or into court, at the option of the tenant for life. But he can only have such option, primâ facie, when there are trustees, so that the purchaser could hardly pay his purchase-money without ascertaining that there were trustees to whom it might be paid." I quite agree that if the purchaser in this case, supposing there had been trustees and in ignorance of the fact that there were no trustees, had paid his money into court, he would have got a good title. But he has notice that there are no trustees, and he refuses to complete. In my opinion, in those circumstances, such a title as the tenant for life requires him to take ought not to be forced upon him. I was referred to the observations made by Lindley L.J. in the case of *Mogridge* v. *Clapp* (5), where he said, "Even if the plaintiff had known that there were no trustees, it would not follow that his title would be bad." But he was dealing with the special case of a lease; and on the very same page, with reference to a sale, after observing that *Wheelwright* v. *Walker* (6) was the case of a sale, and that the purchaser did not propose to pay the money into court, he says this: "I also think that the omission to take these steps might prevent the tenant for life from obtaining specific performance against an unwilling lessee." Still less, it appears to me, would the tenant for life have been able to compel a purchaser to take a conveyance in the case where the purchaser knew before he paid his money and got a conveyance that there were no trustees in existence.

Such a title as that, in my opinion, ought not to be forced upon a purchaser, having regard to the very great doubt whether in such a case he would not get a defective title. The case of

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(1) 38 Ch. D. 334.
(2) Ibid. 345.
(3) [1892] 3 Ch. 382.
(4) [1892] 3 Ch. 400.
(5) Ibid. 395.
(6) 23 Ch. D. 752.

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Hughes v. *Fanagan* (1), although not a binding authority upon me, is a strong case for shewing, to say the least of it, that the purchaser in this case, if he did pay his money into court under the circumstances with the knowledge he had, and obtained a conveyance from the tenant for life, would obtain a doubtful title. Such a title as that ought not to be forced upon him. For these reasons I dismiss the application with costs.

Solicitors: *Currie, Williams & Williams; Peard & Son.*

G. M.

In re WREXHAM, MOLD AND CONNAH'S QUAY RAILWAY COMPANY.

ROMER J.
1898
Aug. 10; Nov. 1.

Railway Company—Debentures—Interest on—Overdrawing Banker's Account—Subrogation.

A railway company having power to create and issue debentures were permitted by their bankers to overdraw their account to a large amount for the purpose of paying the interest on the debentures. In 1897 judgment was obtained against the railway company, and a receiver was subsequently appointed. The bank had no knowledge when allowing the overdraft that proceedings were pending against the company. The bank claimed to be entitled to be subrogated to the rights of the debenture-holders in respect of the overdraft, and that the same should be paid by the receiver in priority to any payment to the debenture-holders:—

Held, that the bank was not entitled as against the debenture-holders to have any part of its claim paid out of moneys in the receiver's hands before payment thereout of interest due and payable to the debenture-holders.

This was an application on the part of the North and South Wales Bank for an order that they were entitled to be subrogated to the rights of the debenture-holders of the above railway company to the extent of the sum of 7601*l*. 8*s*. 5*d*. and interest, being the balance due to the bank on account of moneys paid by them at the request of the railway company in discharge of interest, which became due in August, 1897, from the railway company to the holders of debenture stock of the company, and for an order that the receiver appointed in the

(1) 30 L. R. Ir. 111.

above matter should, out of any moneys in or coming to his hands as such receiver, first discharge the principal sum and interest due to the bank in priority to any payments to be made by him to the debenture-holders.

Under their Acts the above company was authorized to create and issue in the name of the company debenture stock to be permanently charged upon the undertaking of the company, and nearly the whole of such debenture stock was issued.

The railway company for many years kept an account current with the North and South Wales Bank at their Wrexham branch. This current account was used in connection with the working of the railway, the working expenses being paid out of the account, and the railway receipts being paid in. When the railway company required funds to pay debenture interest, the company sent to the bank a list of the debenture interest warrants, and requested the bank to pay the interest. The payments sometimes necessitated the overdrawing of the account, but the overdraft was always, before the borrowing hereafter mentioned, paid off by payment into the account of the railway company's receipts.

In July, 1897, in anticipation of the debenture interest which would become due on August 1, 1897, the railway company requested the manager of the bank to allow a further overdraft of between 9000*l.* and 10,000*l.* in order to meet such interest.

This application was acceded to, and shortly after August 3, 1897, the sum of 9672*l.* was paid by the bank to the debenture-holders, and the then overdraft was increased by that sum.

On August 5, 1897, the Great Central Railway Company obtained judgment against the Wrexham Company in respect of a sum of about 60,000*l.*, and on September 8, 1897, a receiver and manager was appointed.

When the bank allowed the last overdraft, they had no knowledge that any proceedings were pending against the Wrexham Company, or that any such proceedings were contemplated.

The account current with the bank was continued till November 5, 1897, when it was discontinued by the receiver, at which time the balance due to the bank was 7389*l.* 14*s.* 1*d.*, which was subsequently increased by interest and bank charges to 7601*l*. 8*s*. 5*d*.

Neville, *Q.C.*, *Methold*, and *Danckwerts*, for the bank. The railway company had no power to borrow this money, and, consequently, did not become liable to pay it. The money borrowed was applied in payment of the interest on the debenture stock of the railway company, which was a charge on the undertaking of that company; and the bank is entitled to stand in the shoes of the debenture-holders to the extent of the interest so paid: *Blackburn Building Society* v. *Cunliffe Brooks & Co.* (1); *Baroness Wenlock* v. *River Dee Co.* (2); *In re Cork and Youghal Ry. Co.* (3) The bank is entitled not only as against the railway company, but as against the debenture-holders, to be considered as assignees of the interest and as having a charge on the undertaking, giving it a right to call on the receiver when he has moneys in his hands to pay the bank before he pays the debenture-holders their interest.

Frederic Thompson, for certain of the debenture-holders. None of the authorities cited bear out the contention on the part of the bank that the debenture-holders are to be treated as ranking after the bank. The debenture-holders did not assign the interest to the bank—it was paid by the railway company in the ordinary way; and the debenture-holders were not bound to inquire how the money was obtained to pay their interest. The bank is not to be regarded as a creditor whose debt is to be paid by the receiver in priority to the debenture-holders.

Theobald, for debenture-holders in the same interest.

R. J. Parker, for the Wrexham Company.

Mark Romer, for the Great Central Railway Company.

Neville, *Q.C.*, in reply.

Cur. adv. vult.

Nov. 1. ROMER J. This is an extraordinary application. The applicant, the bank, has already in these proceedings brought in a claim to be admitted as a creditor of the railway company, and so far neither the railway company nor the debenture stockholders have disputed the claim of the bank to be regarded as an ordinary creditor of the railway company. But the bank now applies to the Court and seeks in substance to establish as to the sum mentioned in the summons, being money borrowed from it by the railway company, that the railway company had no power to borrow this money, and consequently did not become liable to repay it. The bank seeks to establish that it is not directly a creditor in order to assert that thereby it is placed in a better position than if the money had been validly borrowed. And it seeks to establish this startling proposition in the following way: It contends (1.) that the borrowed money was applied in paying interest on the debenture stock of the railway company, which is a charge on the undertaking of that company; (2.) that on the principle of the well-known cases cited before me the bank is, therefore, entitled to stand in the shoes of the debenture stockholders to the extent of the interest so paid; and (3.) that the bank is, moreover, entitled not only as against the railway company, but as against the debenture stockholders themselves, to be considered as assignees of that interest as if it had never been paid, and as having a charge, or something in the nature of a charge, on the undertaking of the railway company which gives it a right to call upon the receiver, when he has moneys in his hands available for payment of subsequent interest due on the debenture stock, to pay the bank before he pays the debenture stockholders their interest. At the present time the receiver has not, and he may never have, any moneys in hand available for payment of the ordinary creditors of the railway company after paying the debenture-holders their interest, and no one is at present concerned in considering whether the bank is an ordinary creditor of the railway company, either by reason of the original borrowing or by reason of the borrowed money having been applied in paying off debts of the railway company which that company was legally liable to pay. The real object, therefore, of the present application is to obtain a decision of the Court, as against the debenture stockholders, that the bank's claim has priority over their interest. The first two contentions of the bank I may, therefore, pass by, or assume to be correct, if its third contention fails. And dealing with this third contention, I cannot see on what principle I can hold, as against the debenture stockholders, that they are to be treated as ranking after the bank. No authority whatever gives sanction to any such claim on the bank's part. As to the past interest, the stockholders never assigned it to the bank. It was paid by the railway company in the ordinary way so far as they were concerned, and it did not matter to them or form any matter for inquiry on their part how the railway company got the money to pay that interest. There are, no doubt, expressions in some of the judgments in the cases of subrogation above referred to which speak of the person who has lent money to a company which the company was not legally liable to repay, but which was applied in paying the legal debts of that company, as being entitled under the circumstances of those cases to be considered as assignee of the debts and rights of the creditors paid. But those expressions were used with reference to the only question before the Courts in those cases, which was, whether as between the person who lent the money to the company and the company he could be regarded as having a claim in respect of that money, and in no wise concerned questions between that person and the creditors whose debts were paid. The argument on the part of the bank that, as between the creditors paid and the person whose money went in paying them, he is to be treated as if those creditors had actually assigned to him their debts and securities is in my opinion unfounded. If well founded, it would lead to the most astonishing results. For instance, consider the case of a creditor of a building society whose debt is secured on the land of the society. If that society is being wound up, could a person from whom the society illegally borrowed money come forward, and by proving that his money went in paying off part of the secured creditor's debt, be entitled as against that creditor to have the security applied in repaying the money borrowed before it was made available to the secured creditor for the payment of the balance of his debt? Clearly not; and yet it appears to me that the bank's contention in the present case

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(1) (1882) 22 Ch. D. 61; (1884) 9 App. Cas. 857.

(2) (1887) 19 Q. B. D. 155.

(3) (1869) L. R. 4 Ch. 748.

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would lead to such a result. I therefore hold that the bank is not to be regarded in these proceedings as a creditor whose debt is to be paid by the receiver in priority to the debenture stockholders. I propose, therefore, to make this declaration: Declare that the bank is not entitled as against the debenture stockholders to have any part of its claim paid out of moneys in the receiver's hands before payment thereout of interest due and payable to the debenture stockholders. Beyond that it appears to me unnecessary to make any further order on this summons beyond ordering the bank, which has substantially failed, to pay the costs. But it should be stated that this is not to prejudice any claim of the bank, or any application it may make, in respect of any moneys that may be in the hands of the receiver after paying all interest due and payable to the debenture stockholders and available for payment of other debts of or claims against the railway company.

Solicitors: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool; Field, Roscoe & Co., for Evan Morris & Co., Wrexham; Sharpe, Parker & Co., for Alsop, Stevens, Harvey & Crooks, Liverpool; Norris, Allens & Chapman, for J. B. Pollitt, Manchester; Cunliffes & Davenport, for R. B. Lingard-Monk, Manchester.*

G. M.

In re THE SCHOOL FOR THE INDIGENT BLIND AT LIVERPOOL.

BYRNE J.

1898

July 2.

Charitable Institution—Special Act (10 *Geo.* 4, *c. xv.*), *ss.* 22, 26—*Salary of Chaplain—To be paid "without any Deduction or Abatement for Taxes"—Income Tax—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 102, *and Sched. E*, *rr.* 1, 3, 6.

The Special Act passed in 1829 incorporating a charitable institution provided that the salary of the chaplain should not be less than 300*l.* nor more than 500*l.* per annum, and that the wardens should pay it to him "without any deduction or abatement for taxes or otherwise howsoever":—

Held, that the wardens were nevertheless bound under the provisions of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), to deduct income tax from the chaplain's salary.

In the year 1791 a charitable institution was established at Liverpool called "The School for the Indigent Blind." A chapel was attached to the institution.

In the year 1829 the subscribers to the institution were incorporated by the Special Act (10 Geo. 4, c. xv.), which contained provisions for the management of the charity, and regulations for the salary and duties of the chaplain of the chapel. Sect. 22 of the Act provided that there should be regularly a chaplain to officiate at the chapel, and vested in certain persons the right of nomination and appointment to the chaplaincy. Sect. 26 enacted, "that for the maintenance of the chaplain for the time being of the said chapel, the persons who shall be wardens thereof for the time being in pursuance of this Act, and their successors, shall, by and out of the rents of pews or seats erected therein, yearly and every year, well and truly pay or cause to be paid to such chaplain, as may be directed by the said committee, a sum not less than 300*l.*, nor exceeding 500*l.*, of lawful English money, without any deduction or abatement for taxes or otherwise howsoever, on January 1 and on July 1 in each year, by even and equal portions, and the money so to be paid shall be allowed to such wardens in their account." Sect. 27 provided for the recovery of the chaplain's salary in case of non-payment. Sect. 34

empowered the said committee to apply the surplus pew rents in (amongst other things) augmenting the salary of the chaplain. Sect. 43 enacted that the Act should be a public Act. At the time this Special Act was passed no income tax was in force, the previous Income Tax Act of 1806 having expired; but by the Act 5 & 6 Vict. c. 35, income tax was imposed on all salaries; and by Sched. E of the Act, rules 1 and 6, the duties chargeable under the Act in respect of such salaries, &c., "shall be detained and stopped out of the same"; and s. 103 imposes a penalty on any person refusing to allow any deduction authorized by the Act out of any annual payment, and enacts that all contracts, &c., made or entered into for payment of any annual payment aforesaid in full without allowing such deduction shall be void.

In 1884 the chaplaincy became vacant, and the authorities of the institution advertised in the usual way for a chaplain. In response to the advertisement the Rev. T. Lund, amongst others, applied for the office, and was duly appointed chaplain at a salary of 500*l.* per annum.

From 1884 down to the present time the wardens had paid the chaplain his salary of 500*l.* per annum in full, and he thereout duly accounted for and paid the income tax thereon to the Inland Revenue. But he now contended that on the terms of the Special Act he was entitled not only to his salary in full, but that the wardens ought also to pay the income tax thereon. An originating summons was taken out to determine the question, and now came on for hearing.

Hughes, Q.C., and *Sampson*, for the chaplain. In 1829, when the Special Act was passed, income tax was a known form of tax, although it was not then in force, because the previous Income Tax Acts had expired. It is reasonable to suppose, therefore, that that tax was in the contemplation of the Legislature when the Special Act was passed, the words of exemption are so strong—"without any deduction or abatement for taxes or otherwise howsoever." In *Seward* v. *Owners of "Vera Cruz"* (1) Lord Selborne says (2): "Now if anything be

(1) (1884) 10 App. Cas. 59.

(2) 10 App. Cas. 68.

certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." It is submitted, therefore, that the general provisions of the Income Tax Act, 1842, do not override the express words of the previous Special Act of 1829. Although the circumstances under which Mr. Lund was appointed chaplain is in a sense a contract between him and the institution, yet it is not such a contract as is hit at by s. 103 of the Income Tax Act, 1842. In *Festing* v. *Taylor* (1) a rent-charge granted by a will was held not subject to income tax. Mr. Lund is in the same position as an annuitant under a will. He takes his salary under the provisions of the Special Act, and not solely under his appointment by the committee of the institution. They are in the position of trustees, and are bound to indemnify him against the tax out of the funds of the institution.

Eve, Q.C., and *Stuart Deacon*, for the institution. We agree that the wardens are in the position of trustees, and, having regard to ss. 26 and 34 of the Special Act, they cannot pay this tax out of the funds of the institution. It would be a breach of trust. The circumstances of Mr. Lund's appointment were in effect a contract between the institution and him to pay him a certain salary. It is a contract within s. 103 of the Income Tax Act, 1842, and under Sched. E the wardens are merely the hand to collect the tax out of his salary.

Hughes, Q.C., in reply.

BYRNE J. In this case the chaplain of the chapel of the School for the Indigent Blind at Liverpool claims to be entitled to be paid his salary of 500*l.* a year without the deduction of income tax from it by those who have appointed him. The Act of Parliament under which a chaplain could be appointed to this institution was passed in the year 1829, and

(1) (1862) 3 B. & S. 217.

at that time there was no Act of Parliament imposing an income tax at all. The 26th section of that Act provides, that for the maintenance of the chaplain for the time being of the said chapel the persons who shall be wardens thereof for the time being in pursuance of the Act, and their successors, shall, by and out of the rents of pews or seats erected therein yearly and every year, well and truly pay or cause to be paid to such chaplain as may be directed by the said committee " a sum not less than 300*l.*, nor exceeding 500*l.*, of lawful English money, without any deduction or abatement for taxes or otherwise howsoever," on the days therein mentioned. Then by the following section remedies are given for the recovery of the chaplain's salary, including the power to go before the bishop of the diocese and to obtain a sequestration of profits, or to sue by action of debt. And s. 43 says the Act is a public Act, though a special public Act. Then the Income Tax Act, 1842, clearly imposes an income tax upon a salary such as that which the chaplain is in receipt of. The chaplain was appointed, by resolution of the body entitled to appoint him, some time in 1884, at a salary of 500*l.* a year. That appointment involved a determination of what the salary of the chaplain was to be, because the Act of Parliament only gives limits within which the salary must range. That determination of the amount of the salary appears to me to amount to a contract between the parties appointing the chaplain and the chaplain himself. By the Act of 1842 it is provided in express terms that the duties chargeable under this Act in respect of such salaries—I will not go through the rest of the words, but including such salaries as are payable in the present case—" shall be detained and stopped out of the same, or out of any money which shall be paid upon such salaries, fees, wages, perquisites, or profits, or for arrears thereof, whenever the same shall happen, and be applied to the satisfaction of the duties (not otherwise paid) in the manner directed by this Act." Now up to the present time, since 1884, the chapel authorities have been in the habit of paying over the full sum of 500*l.*, and the chaplain has been accustomed, as indeed he was bound to do, to pay his own income tax out of the money received by him from them.

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They now propose, as it has been called to their attention that there is a duty imposed upon them by the Act of 1842, before paying the salary to detain out of it the income tax. To the chaplain himself, if this course is pursued, it makes no difference. It is a matter of collection. It is for the convenience of collection and to ensure payment that the hand to pay the tax is made by the statute the payer instead of the payee in this case. But it is said that inasmuch as the special Act of Parliament provides that the salary, whether it is 300*l.*, or whether it amounts to 500*l.*, or any intermediate sum, is to be paid without any deduction or abatement for taxes, they cannot say they are to deduct, or detain, which is the same thing, this tax. It is equivalent to saying that they are to pay a further sum equal to the amount of the tax so as to make up the full sum of 500*l.* to the chaplain. I do not think that is the true effect of this legislation and of the bargain that has been entered into between the parties. I think the effect of it is this: that the Act of 1842 provides machinery imposing a duty upon the trustees to deduct or detain money from payments which would otherwise be made in full. That is imposed upon them by an Act of Parliament, and they cannot refuse to do it. Therefore it seems to me that inasmuch as it does not impose an additional burden upon the chaplain, for, as I have said, if he were paid the 500*l.* without this deduction he would have to pay the income tax himself, it being a personal tax; I think the true result of it is that the chaplain is not entitled to be paid 500*l.* in full, and that the governing body are not bound to recoup him that which they are obliged to pay, and which the Act of Parliament says they are to pay, by way of detention out of his salary. Wherefore, I so hold.

Solicitors for all parties: *Stone, Fletcher, Hull & Stone, Liverpool.*

H. L. F.

BYRNE J.
1898
July 4, 7.

LORD HASTINGS *v.* NORTH EASTERN RAILWAY COMPANY.

[1897 H. 1564.]

Rent—Way-leave over Land—Right of Reversioner—32 *Hen.* 8, *c.* 34, *s.* 1.

The owner in fee of land demised to a railway company for a term of years a way-leave over his land, with the right to make and use a railway thereover, reserving to himself, his heirs and assigns, a periodical payment on coals, &c., carried over any part of the railways comprehended in the company's special Act to Port B. These railways included the one in respect of which the way-leave was granted; but subsequently coal was carried to Port B. over a part of one of the railways comprehended in the Act which was not on the land of the lessor:—

Held, that the amount was payable in respect of the hereditaments demised, and on the lessor's death was payable to the reversioner.

In this case the plaintiff, The Right Honourable George Manners, Baron Hastings, claimed payment from the North Eastern Railway Company of 3*s*. per ten—a ten being forty-five tons—in respect of coal carried over a portion of the defendant company's railway known as the Morpeth Branch Railway, and shipped at the Port of Blyth, and for an account of the coal so carried and shipped.

The defendant company was the successor and had acquired by statute the undertaking of the Blyth and Tyne Railway Company (below called the Blyth Company), subject to all existing contracts, debts, liabilities, engagements, and obligations affecting the same, and to the payment of or discharge, performance, or observance thereof by the defendant company; and Byrne J. at the trial of the action held that the defendant company was liable if the Blyth Company would have been liable.

The Blyth Company was incorporated by the Blyth and Tyne Railway Act, 1852, and was thereby authorized to construct a railway with certain branches from a quay adjoining the river Blyth to certain points upon the river Tyne, this railway passing, for part of its length, over lands belonging to the Right Honourable Jacob, (then) Lord Hastings, the plaintiff's predecessor in title.

Prior to the passing of this Act an agreement was entered into between Jacob, Lord Hastings and the promoters of the Blyth Company providing for the lease of a way-leave over the portion of his estates through which the main line passed, and payment of rents for coal and traffic to be conveyed by the railway through any part of his property.

By a lease of May 20, 1853, Jacob, Lord Hastings granted and demised to the Blyth Company a way-leave upon and over all such parts of the line of the railway as authorized by the Act as were made upon his estates, to hold for 1000 years from May, 1845, reserving (as Byrne J. construed the deed) certain rents calculated on the tonnage of coal, coke, culm, and cinders passing over and along the main railway and certain branches of it, and certain other rent for passengers and goods other than coals, &c., passing over any part of the main railway and branches. In the judgment of Byrne J., the passenger and goods rent was payable only in respect of passengers and goods conveyed over some part of the lessor's lands; but the other tonnage rents were to be paid even though the coals, &c., were not actually carried over any part of the lessor's lands.

By an agreement dated May 21, 1853, after reciting the lease above mentioned and the withdrawal of Lord Hastings' opposition to a Bill in Parliament intended to be brought in by the Blyth Company, that company agreed to execute a counterpart of a lease to it from Lord Hastings of a way-leave over certain described portions of his land for the same term and upon the terms and conditions of the recited lease, it being understood that the said terms, so far as they consisted of certain rents and reservations, were to include the payment for passing over the entire line or lines of railway, or any part or parcel thereof, whether authorized by an Act already obtained or by the proposed Act.

The Bill referred to became the Blyth and Tyne Railway Branch Act, 1853, which authorized the company to make and maintain certain branch lines, communicating by junctions with the main line, and called the Dairy House Branch and the Morpeth Branch.

After the Act of 1853 was passed the rents theretofore payable in respect of the main line became payable in respect thereof and of the two branches above named.

By an indenture dated May 18, 1854, and made between Jacob, Lord Hastings and the Blyth Company, after a reference to the Act of 1852 and a recital that a Bill was pending in Parliament for the purpose of, amongst other things, enabling the company to continue and maintain, or make, complete, and maintain, amongst others the Dairy House Branch, a railway out of the Dairy House Branch called the Tynemouth Extension, and the Morpeth Branch, which railways and the works in connection therewith were "intended to pass and be made to a great extent in, upon, and through lands belonging to the said Lord Hastings," Lord Hastings (so far as related "to the acts and deeds by him, his heirs and assigns, to be observed and performed"), did "for himself and them covenant with the said company and their assigns," and the company covenanted with "Lord Hastings, his heirs and assigns," that, immediately after the passing of the Bill into law, Lord Hastings, his heirs or assigns, would by deed make, and the company would accept, a grant of way-leave and right and liberty of way and passage in, through, over, and along a defined portion of the lands of Lord Hastings, such deed to be in the form of lease therein set out.

On July 3, 1854, the Bill referred to became law as the Blyth and Tyne Railway Consolidation and Extension Act, 1854. This Act was a consolidating Act and repealed the former Acts, but authorized the company to continue and maintain, or make, complete, and maintain, the main line and branches. A portion of the main line, the whole of the Dairy House Branch, and portions of the Morpeth Branch and the Tynemouth Extension, passed through Lord Hastings' land; and by the lease Lord Hastings granted to the Blyth Company a way-leave or right of way, and liberty, power, and authority to construct the railway and works, or such parts thereof as were to pass or be made through or in his lands, upon his lands, and to enter upon and use the railways; to hold the way-leave, liberties, privileges, and works unto the company and their assigns for 1000 years from May Day, 1845. "Yielding and paying" (inter alia) "on coals, coke, culm, and cinders conveyed over and along any part of the railways comprehended in the" Act of 1854, "and which shall be shipped at the Port of Blyth (other than such coals, coke, culm, and cinders as are comprehended in the reservation of rent next hereinafter contained), the sum of 3*s.* per ten." The lease gave powers of distress and entry to Lord Hastings, "his heirs or assigns," in case of non-payment of the rents reserved, and a covenant by the Blyth Company with Lord Hastings, "his heirs and assigns," to pay the rents to him, "his heirs, or assigns."

The Morpeth Branch was afterwards tapped, and coals were carried by the defendant company over part of that branch to the Port of Blyth and there shipped without passing over any portion of the plaintiff's land.

In his judgment in the action, from which the above statement of facts is principally taken, Byrne J. held that upon the construction to be placed on the deed of May 18, 1854, with the embodied form of lease, having regard to the prior agreements, the plaintiff was entitled to be paid for coals, coke, culm, and cinders conveyed over any portion of the Morpeth Branch and shipped at the Port of Blyth, although not passing over any portion of that branch constructed in or through his property.

The question was then raised whether the plaintiff, as the successor in title of Jacob, Lord Hastings, in respect of the land, and the owner of the reversion, was entitled to the rent of 3*s.* per ten, or whether it belonged to the legal personal representatives of Jacob, Lord Hastings.

Eve, Q.C., and *George Henderson*, for the plaintiff. The plaintiff as the owner of the reversion is entitled to the rent. It is reserved to the lessor, his heirs and assigns, out of the land demised, and is payable to the plaintiff although it may be assessed on coals not passing over his land.

Swinfen Eady, *Q.C.*, *Astbury*, *Q.C.*, and *Mackarness*, for the defendant company. The amount which the company covenanted to pay is not a rent passing with the ownership of the land, but a sum payable for the enjoyment of a simple liberty or licence. What was granted was merely permission to let certain lines of rails go over the land and to use the lines for traffic—and that does not constitute the relation of landlord and tenant: *Hancock* v. *Austin*. (1) The right to rent runs with the reversion; but in this case there is no reversion, because as there was no demise no particular estate was created. What is to be paid is a sum in respect of the passing of traffic over certain lines, and it has been held to be payable even if the traffic does not pass over the Hastings property; therefore this is a stronger case than *Hancock* v. *Austin* (1), in which the machines were actually in the room which was said to be demised.

[They also referred to *Spencer's Case* (2); *Clifford* v. *Hoare* (3); Burton's Compendium, 7th ed. p. 336.]

Eve, *Q.C.*, in reply.

July 7. BYRNE J. The interest conferred upon the railway company—namely, a way-leave over land of the grantor, with the right to make a railway thereover, and with the other powers given to them—is, in my judgment, an "incorporeal hereditament, a property, and an estate capable of being inherited by the heir" (if granted to an individual) "and of being assigned to a purchaser." It is a "tenement" within the definition of Lord Coke (1 Inst. 20*a*), being an inheritance concerning or annexed to or exercisable within a corporate inheritance. I have nearly followed the judgment of the Court in the case of *Martyn* v. *Williams* (4), and, following the further reasoning in the same case, I think that the plaintiff is the owner of the reversion within the statute of 32 Hen. 8. To quote from the report (5): "There is in reality the relation of reversioner and ownership of particular estates between them;

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(1) (1863) 14 C. B. (N.S.) 634.

(2) (1583) 5 Rep. 16 a; 1 Sm. L. C. 7th ed. p. 60.

(3) (1874) L. R. 9 C. P. 362.

(4) (1857) 1 H. & N. 817, 827.

(5) Ibid. 830.

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there is exactly the same privity of estate as exists between reversioner and tenant properly so called, and upon the determination of the term the entire interest in the land" would revert "to the plaintiff, as upon the expiration of an ordinary lease. In the ordinary case of owner in fee simple and tenant for years, in which the relation of reversioner and tenant within the statute certainly exists, the owner of the fee, upon the determination of the term, has vested in him a larger and more extensive interest in the corpus of the land than the tenant for years had. His interest in the minerals and timber, and, indeed, in the soil itself, is very different from that of such tenant." In the case of *Norval* v. *Pascoe* (1) the decision in *Martyn* v. *Williams* (2) was followed by Kindersley V.-C., who dealt with other authorities bearing on the matter. In both the cases I have referred to the subject-matter was a lease or licence for a term to dig china clay, with ancillary powers; and in the present case the subject-matter is a lease or licence for a term of a way-leave for a railway to be made and used for traffic over the grantor's land. In general structure it follows the form of what is called "Lease of a way-leave" given in Mr. Davidson's Precedents, 3rd ed. vol. v. part 1 (leases). I think that the subject-matter in the present case is such as to bring it within the principle of the decided cases, and I refer particularly to *Buckeridge* v. *Ingram* (3) and *Earl of Portmore* v. *Bunn* (4) for instances of analogous rights. In the latter of these an action was brought to recover rent against the assignee of the licence for a term to cut a channel to the river Wey, and, although the actual decision turned upon a variance between the declaration and the evidence, it was distinctly held that a mere easement upon the soil of others to make channels and towing-paths is a real hereditament. The covenant to pay rents or annual sums in the present case is in favour of the grantor, his heirs and assigns; and although it is quite true that some of such rents or sums are, as I have held, payable, even although the traffic does not pass over any part of the plaintiff's lands, and that they are calculated in part on

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(1) (1864) 34 L. J. (Ch.) 82.

(2) 1 H. & N. 817.

(3) (1795) 2 Ves. 652.

(4) (1823) 1 B. & C. 694.

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such traffic, nevertheless I consider that the rents are payable in respect of the hereditaments leased, and that the plaintiff is entitled to sue exactly as the original lessor might have done.

Solicitor for plaintiff: *Horace Peel.*

Solicitors for defendant company: *Williamson, Hill & Co., for A. Kaye Butterworth, York.*

F. E.

Distinguished. In re HONE [1951] 1 Ch. 85

Distinguished. Re HONE (a bankrupt).
[1950] 2 All E.R. 716.

BYRNE J.
1898
July 11.

FELIX HADLEY & CO. *v.* HADLEY.

[1895 F. 2704.]

Debt—Conditional Payment—Effect of giving Cheque or Bill of Exchange—Sale of Debts and Securities.

A cheque or bill of exchange given in respect of a pre-existing debt operates as conditional payment thereof, and on the condition being performed by actual payment, the payment relates back to the time when the cheque or bill was given.

Defendant sold to the plaintiff company his business as existing on December 31, 1887, with the goodwill, stock-in-trade, and "all book and other debts due to the vendor in connection with the said business, and the full benefit of all securities for such debts." On January 1, 1888, defendant had in his possession cheques and bills of exchange, given for trade debts, which had been received by him before that date and were subsequently honoured:—

Held, that the trade debts, having been paid, did not pass to the company, and that the cheques and bills were not securities within the meaning of the agreement.

THIS action was brought to recover damages in respect of the sale of the defendant's business to the plaintiff company, but this claim failed. The company also alleged that the defendant had collected and appropriated to his own use, without accounting therefor, book and other debts to the amount of 1092*l.* 7*s.* 10*d.* due to him in connection with the business sold and passing to the company under the sale, and claimed payment of this sum.

The agreement was dated April 5, 1888, and it was thereby agreed that the vendor Felix Hadley should sell to Felix Hadley & Co., Limited—" (*a*) The vendor's business of a cut nail manufacturer, Birmingham, as existing on the 31st day of

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December, 1887, and the goodwill of the same business, inclusive of the trade-marks thereof, and all patent rights and privileges, the company assuming all the liabilities of the same business on and from that date. (*b*) The stock-in-trade of the said business. (*c*) The plant . . . . and other trade effects . . . . used in or appertaining to the said business. (*d*) All book and other debts due to the vendor in connection with the said business, and the full benefit of all securities for such debts, and of all contracts, engagements, rights, and privileges of the vendor in relation to the said business."

At the trial before Byrne J., his Lordship directed an inquiry to be made as to what portion of the 1092*l*. 7*s*. 10*d*. was received and retained by the defendant after January 1, 1888. It was admitted that on that date the defendant had in his possession cheques and bills of exchange which had been received by him from customers in the business sold in payment or satisfaction of trade debts due to him. The cheques and bills had not been then, but were subsequently met and honoured; and the question arose whether the proceeds thereof belonged to the defendant or to the company.

Astbury, *Q.C.*, and *Kirby*, for the company. The proceeds of the bills and cheques belong to the company. On December 31, 1887, the debts in respect of which they were received had not been paid, and therefore passed under the express terms of the agreement. If the word "debts" was not sufficient, the cheques and bills were "securities" for debts. The giving of a cheque or bill for a pre-existing debt does not put an end to the debt, but only suspends the remedies of the creditors until the future day on which the cheque or bill is payable: *Currie* v. *Misa* (1); *M'Lean* v. *Clydesdale Banking Co.* (2)

Eve, *Q.C.*, and *Ingpen*, for the defendant. The proceeds belong to the defendant. The cheque or bill of exchange in each case was a conditional payment of the debt, the condition in such a case being that the debt revives if the cheque or bill is dishonoured: *Belshaw* v. *Bush* (3); *Stott* v. *Fairlamb*. (4)

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(1) (1875) L. R. 10 Ex. 153.
(2) (1883) 9 App. Cas. 95.
(3) (1851) 11 C. B. 191.
(4) (1883) 53 L. J. (Q.B.) 47.

In *M'Lean* v. *Clydesdale Banking Co.* (1), Lord Blackburn says: "I have never been able to perceive any ground for doubting that the Court of Exchequer Chamber were perfectly right in the case of *Currie* v. *Misa* (2) when they held that the payment of a cheque, or a bill payable on demand, on account of a debt to a banker, a payment by which it was intended to be handed to them as property, and not merely handed to them as a servant or agent, but handed to them as cash with the object of reducing a balance, was a payment for perfectly good and valuable consideration." When the cheque or bill is honoured, the payment relates back to the date when the cheque or bill was handed to the creditor.

Astbury, Q.C., in reply.

BYRNE J. The point really turns upon the proper construction to be put upon the agreement of April 5, 1888. By that agreement the vendor agreed to sell his business as existing on December 31, 1887, with the goodwill, the company assuming all the liabilities of the business as and from that date. The sale was to include "all book and other debts due to the vendor in connection with the said business, and the full benefit of all securities for such debts, and of all contracts, engagements, rights, and privileges of the vendor in relation to the said business." On December 31, 1887, the vendor received cheques and bills in payment of debts due to him. Such bills and cheques were not met or honoured on that day; and it is said that, therefore, these debts are debts included within sub-section (*d*). I do not think that that is the true view of it. I think the true view of this agreement is that where debts were paid conditionally or unconditionally, then such debts were not meant to pass to the purchasers. In this case I think what took place amounted to a conditional payment of the debt; the condition being that the cheque or bill should be duly met or honoured at the proper date. If that be the true view, then I think the position is exactly as if an agreement had been expressly made that the bill or cheque should operate as payment unless defeated by dishonour or by not being met; and I think that that agreement is implied from giving and taking the cheques and bills in question. Then, with regard to the words "full benefit of all securities for such debts," those words mean the full benefit of all running securities for such debts as have not been conditionally or unconditionally paid upon that date. Of course, had these bills and cheques not been duly met, then the debts would have revived, and would have been debts due to the vendor; but, inasmuch as they have been met, I consider that, the condition having been observed, there was payment as from the time of giving the bills and cheques.

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(1) 9 App. Cas. 111.

(2) L. R. 10 Ex. 153.

Solicitors for plaintiff company: *Field, Roscoe & Co., for Smith, Pinsent & Co., Birmingham.*

Solicitors for defendant: *Burton, Yeates & Hart, for Johnson & Co., Birmingham.*

F. E.

WRIGHT J.

1898

Oct. 27.

In re LONDON DRAPERY STORES.

[0021 of 1898.]

Company—Winding-up—Costs of outside Litigation—Action commenced before Winding-up.

While a company was a going concern it commenced an action against B. The company afterwards passed an extraordinary resolution for a voluntary winding-up, which was continued under the supervision of the Court. The liquidators obtained the leave of the winding-up Court to continue the action, but B. obtained judgment in the action against the company with costs:—

Held, that the principle of *Boynton* v. *Boynton*, (1879) 4 App. Cas. 733, applied, and that as the liquidators had adopted the action ab initio, B. was entitled to be paid all his costs in full, and not merely the costs as from the commencement of the winding-up with liberty to prove for the costs previously incurred.

THE London Drapery Stores, Limited, while it was a going concern, commenced an action against Earl Brownlow, but before this action came on for trial the company passed an extraordinary resolution for voluntary winding-up, and subsequently the voluntary winding-up was ordered to be continued under the supervision of the Court.

The voluntary liquidators then obtained the leave of the winding-up Court to continue the action, in which, however, Earl Brownlow obtained judgment against the company for his costs of the action. Earl Brownlow claimed to be entitled to be paid all his costs of the action in full, whether incurred before or after the commencement of the voluntary winding-up.

Manisty, for Earl Brownlow. It is not disputed that, as a litigant outside the winding-up, Earl Brownlow is entitled to be paid in full the costs incurred by him in the action after it was continued by the liquidators in the name of the company. But the liquidators will contend that, in respect of the costs incurred between the date of the commencement of the action and the date of the commencement of the winding-up, Earl Brownlow can only claim to prove in the winding-up and rank for dividend with the other creditors. But the liquidators, having obtained liberty to carry on the action, have on behalf of the company adopted the action ab initio, and the company ought to pay the costs from the commencement on the principle laid down in *Boynton* v. *Boynton.* (1) Where a plaintiff had been ordered to pay costs in a suit and then became bankrupt, and his assignee in bankruptcy revived the suit, the Court held that it would stay proceedings until payment of the costs ordered to be paid: *Cook* v. *Hathway.* (2) [He also referred to Buckley on Companies, 7th ed. pp. 270, 271.]

Martelli, for the liquidators. Earl Brownlow is only entitled to prove in the winding-up for the costs incurred before the winding-up commenced. If he had got judgment before that time for his costs, he would only have had a debt in respect of which he could have proved. In neither of the cases cited was there a winding-up of a company. When the liquidators continued the action, the defendant could have obtained an order for security for costs.

[*Frank Evans,* amicus curiae, referred to *In re Snyder Dynamite Projectile Co.* (3)]

WRIGHT J. It seems to me that the liability of the liquidators to pay the costs in full may be held to follow upon what was laid down by Lord Cairns in *Boynton* v. *Boynton* (1), when, dealing with the case of an executor who had obtained an order allowing him to continue the proceedings in an action instituted by his testator, he said: "He"—that was the executor—"thus adopted the suit, and adopted it ab initio. Had he been successful on the appeal he would have retained the cancelled deed, and received the costs ordered to be paid to Lady Boynton, together with the costs of the appeal, and as he has failed, he must, according to the well-settled practice of the Court, submit to an order for payment of the costs personally." Of course, that does not carry the matter the whole way, because the question here is not whether the liquidators are liable to pay the costs, but whether the company is liable to pay them in full. It may very well be that in giving leave to a liquidator to continue an action a term ought to be inserted in the order that the liquidator if he fails should pay the costs of the defendant in full; but again it does not follow that, because there is no such term in the order, the liquidator is not liable to do so. But it seems better to hold that, as the company would have got all the costs if it had succeeded in the action, it ought, if it fails, to be held liable to pay all costs in full of the defendant. That seems to me only just and reasonable. No authorities directly in point have been cited before me; but it seems to be more reasonable to hold that, if in the interests of the company a liquidator elects that an action commenced by it should be continued, the assets of the company should, if the action fails, bear the whole of the costs, than to hold that a part of them should be thrown upon the successful litigant.

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(1) 4 App. Cas. 733, 736.

(2) (1869) L. R. 8 Eq. 612.

(3) W. N. (1893) 37.

Solicitors for Earl Brownlow: *Nicholl, Manisty & Co.*
Solicitors for liquidators: *H. E. Warner & Co.*

F. E.

In re STOCKPORT RAGGED, INDUSTRIAL, AND REFORMATORY SCHOOLS.

C. A.
1898
July 21; Aug. 1, 11.

Charity—Industrial School—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 62—*Proviso as to Extent of Exemption in s.* 62—"*Any Cathedral, Collegiate, Chapter, or other Schools*"—*Ejusdem Generis Rule—Charitable Trusts Act,* 1853, *s.* 66—*Endowment—Charity Commissioners—Jurisdiction—Consent.*

The proviso at the end of s. 62 of the Charitable Trusts Act, 1853, excluding "any cathedral, collegiate, chapter, or other schools" from the "exemption" contained in the section, does not extend to all schools of whatever description, but only extends to the schools there mentioned, and to schools of a similar character.

The decision of Stirling J., [1898] 1 Ch. 610, affirmed.

The trustees of an industrial school maintained by voluntary contributions, Government grants, contributions from school boards, boards of guardians, and other public authorities, and possessed of lands and buildings occupied by the school, presented a petition under Sir Samuel Romilly's Act (52 Geo. 3, c. 101) asking for the sanction of the Court to a proposed mortgage of part of the school lands and buildings:—

Held, by the Court, that the consent of the Charity Commissioners to the presentation of the petition and to the proposed mortgage was necessary, per Lindley M.R., upon the construction of s. 62; and, per Chitty L.J., having regard to the nature of the property proposed to be mortgaged.

The order of Stirling J. reversed.

Government grants, and contributions by school boards, boards of guardians, and other public authorities to an industrial school, are not voluntary contributions within s. 62.

Appeal from Stirling J.

For several years prior to 1865 a school for poor children had existed in Stockport, which school was managed by a committee, and was at first supported entirely by voluntary subscriptions, which were afterwards augmented by a grant from Government.

In 1865 the committee purchased a freehold house and grounds in Stockport called Town End House which they had previously rented, and the rack rental of which was about 20*l.* a year.

The consideration for the purchase was a perpetual yearly rent-charge of 20*l.* in favour of the vendors, their heirs and assigns, issuing out of the premises, and the sum of 10*s.*; and the premises were, by an indenture dated November 28, 1865, conveyed subject to this rent-charge to three nominees of the committee in fee. No trusts were declared by this deed.

About this time the Marquis of Westminster made several donations to the school amounting to over 1300*l.*, and therewith, and with other voluntary contributions, improvements were made in it, the existing building was renovated, new buildings were erected, and the school was carried on upon these premises, which were known as Town End House.

In 1866 the school was certified under the Industrial Schools Act, and it was thenceforth called the Stockport Ragged, Industrial, and Reformatory Schools.

The annual rent-charge of 20*l.* was always paid out of the general funds of the charity.

By an indenture dated June 20, 1866, the three nominees above mentioned conveyed the Town End House property subject to the rent-charge to fifteen trustees upon trust to permit the land and school-house to be used as a ragged, industrial, and reformatory school, to be governed by a committee of management constituted and empowered as therein provided, and having the exclusive management and disposal of the funds and finances of the school; and the trustees were thereby empowered to sell the premises thereby conveyed, and to apply the proceeds in building or acquiring other larger and more convenient premises to be settled on the same trusts as the premises thereby conveyed.

The school thus constituted was for many years carried on at Town End House, and its income (which now amounted to about 4000*l.* a year) was derived from a grant from Government, contributions from school boards, boards of guardians, and other public authorities in various parts of the country, subscriptions from residents in the neighbourhood of Stockport, and the earnings of the school-children in their industrial capacity.

It appeared from the evidence that all donations or bequests made to the school were applied by the committee of management in aid of the voluntary contributions and other sources of income mentioned above.

On November 7, 1887, a lease for the term of 999 years, from September, 1887, of a piece of land in Dial Stone Lane, Stockport, was granted to three nominees of the trustees at the annual rent of 20*l.*, and on this site the committee of management built a school-house for girls. The cost of so doing was defrayed by the committee, as to 2000*l.* by subscriptions, and as to 1500*l.* and upwards by a balance which they had in their hands derived from legacies and from voluntary contributions and profits from the school-children's industrial occupations during previous years. This building was completed in 1888, and the annual rent was paid out of the general funds of the school.

In February, 1890, a strip of land adjoining the girls' school was demised to the same three persons for a similar term and similar purposes.

Owing to the growth of the town of Stockport, the situation of Town End House and grounds had become unsuitable for the schools. The buildings were insufficient to accommodate the present numbers of the scholars, and the Government inspector had given notice that unless the buildings were enlarged the number of the children must be reduced, which would also reduce the income of the charity.

Under these circumstances the trustees of the school and the committee of management proposed to remove the boys' school carried on upon the Town End House property from its present to a more suitable position, and with that object to sell that property under the power in that behalf contained in the trust deed of June 20, 1866, and out of the proceeds, together with a sum to be raised by mortgage of the girls' school at Dial Stone Lane and of the new boys' school, to erect a larger and more convenient school for 150 boys.

The trustees of the school accordingly presented a petition under the provisions of Sir Samuel Romilly's Act (52 Geo. 3, c. 101) praying that they might be at liberty to execute such deeds as might be necessary for carrying the proposed mortgages into effect, and to apply the moneys to be raised thereby to the erection of the proposed new school.

It appeared that the petitioners had already purchased a plot

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of land as a site for the new boys' school at Offerton, a suburb of Stockport near the girls' school, containing 5 acres, for the sum of 1000*l.*, which had been paid out of the general funds of the charity in the hands of the committee of management; and that this plot had been conveyed to nominees of the charity in fee simple.

The petition received the fiat of the Attorney-General, and came on before Stirling J. on January 12, 1898. (1) It was opposed by the Charity Commissioners upon the ground that the proviso at the end of s. 62 of the Charitable Trusts Act, 1853, excludes all schools whatever from the exemption found in that section; and, further, that the property proposed to be mortgaged was an endowment within the meaning of s. 66 of the same Act, and that the sanction of the Charity Commissioners to the mortgage was necessary. The questions turned upon the 62nd and 66th sections of the Charitable Trusts Act, 1853. (2)

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(1) See [1898] 1 Ch. 610.

(2) The 62nd and 66th sections of the Charitable Trusts Act, 1853, are as follows:—

Sect. 62: "This Act shall not extend to the Universities of Oxford, Cambridge, London, or Durham, or any college or hall in the said Universities of Oxford, Cambridge, and Durham, or to any cathedral or collegiate church, or to any building registered as a place of meeting for religious worship with the Registrar-General of births, deaths, or marriages in England and Wales, and bonâ fide used as a place of meeting for religious worship; nor shall this Act, for the period of two years from the passing thereof, extend or be in any manner applied to charities or institutions, the funds or income of which are applicable exclusively for the benefit of persons of the Roman Catholic persuasion, and which are under the superintendence or control of persons of that persuasion, nor shall this Act extend or be applied to the Commissioners of Queen Anne's Bounty, or to the British Museum, or to any friendly or benefit society, or savings bank, or any institution, establishment, or society for religious or other charitable purposes, or to the auxiliary or branch associations connected therewith, wholly maintained by voluntary contributions, or any bookselling or publishing business carried on by or under the direction of any society wholly or partially exempted from this Act, so far as such business is or shall be carried on by means of voluntary contributions only, or the capital or stock of such business; and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or

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Stirling J. held that the property which was proposed to be mortgaged appeared to be an "endowment" within the meaning of s. 66 of the Charitable Trusts Act, 1853; but that the school in question was not included in the exception at the end of s. 62 of the Act of 1853; and made an order which, so far as is material, was as follows: "This Court being of opinion that the exception at the end of s. 62 of the Charitable Trusts Act, 1853, does not include the school in the petition mentioned, and that the consent of the Charity Commissioners to

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bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said board or the powers or provisions of this Act; and nothing in this Act shall subject the funds or property of any missionary or other similar society, or the missionaries, teachers, or officers of such society, or of any branch thereof, which funds or property shall not be within the limits of England or Wales, to the jurisdiction of the said board: Provided always, that the said exemption shall not extend to any cathedral, collegiate, chapter, or other schools."

Sect. 66: "In the construction of this Act, except where the context or other provisions of the Act may require a different construction . . . . the expression 'charity' shall mean every endowed foundation and institution taking or to take effect in England or Wales, and coming within the meaning, purvieu, or interpretation of the statute 43 Eliz. c. 4, or as to which, or the administration of the revenues or property whereof, the Court of Chancery has or may exercise jurisdiction . . . . and the expression 'endowment' shall mean and include all lands and real estate whatsoever, of any tenure, and any charge thereon, or interest therein, and all stocks, funds, moneys, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof; and the expression 'land' shall extend to and include manors, messuages, buildings, tenements, and hereditaments, corporeal and incorporeal, of every tenure and description."

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the presentation of the petition is not necessary, this Court doth order that the petitioners and their co-trustees . . . . be at liberty to execute such deeds as may be necessary for carrying the proposed mortgages in the said petition mentioned into effect . . . . and be at liberty to apply the moneys to be raised by such mortgages in and towards the erection of the proposed new schools in the petition mentioned."

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the Charity Commissioners. The property proposed to be mortgaged is clearly an " endowment " within the definition in the Charitable Trusts Act, 1853, s. 66. The question is whether the school is within the exemption clause in s. 62, the proviso at the end of which is, " the said exemption shall not extend to any cathedral, collegiate chapter, or other schools." This exemption clause has been interpreted by *In re Clergy Orphan Corporation* (1); and, according to the principles laid down in that case, the exemption (apart from the proviso) does not apply at all, for the judgment of the Court there is that it applies only to charities entirely maintained by voluntary subscriptions, or partly maintained by voluntary subscriptions and partly by the income of endowments. These schools do not fall within the first of these two classes because they are maintained partly by voluntary subscriptions and partly by Government grants, contributions from school boards, boards of guardians, and other public authorities, and by the earnings of the school-children. And they do not fall within the second because their endowment does not produce any income. We say, therefore, that this institution does not come within the exemption clause at all. But, secondly, supposing we are wrong upon that, we say that the proviso takes the case out of the section. The ejusdem generis doctrine is to be applied with great caution: *Smelting Company of Australia* v. *Inland Revenue Commissioners*. (2)

[LINDLEY M.R. What do you say to the argument in the last paragraph of the judgment of Stirling J.?]

That it lays no ground for cutting down the plain meaning of words: *Fenwick* v. *Schmalz.* (1) The judge has not suggested any school which could come in as being ejusdem generis with "cathedral, collegiate, or chapter schools"; and schools generally, including all endowed schools, are within the Act.

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(1) [1894] 3 Ch. 145.

(2) [1897] 1 Q. B. 175, 182.

[They also referred to *In re Duncan* (2); and the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56).]

[LINDLEY M.R. referred to *Anderson* v. *Anderson.* (3)]

Henry Johnston, for the trustees and the committee of management of the schools. These schools are not a "charity" within the definition in s. 66 of the Act of 1853, and are, therefore, not within the Acts at all. The interpretation of "endowment," which is wide enough to include every shilling given to a charity, cannot be read into the interpretation of "charity," namely, "endowed foundation or institution"; and must only be applied in sections where the word "endowment" occurs. The natural meaning of the word "endowed" is "furnished with money or its equivalent as a permanent fund for support." The schools are not so furnished.

[COLLINS L.J. They are possessed of land and the school buildings erected thereon.]

That is the foundation or institution. The institution cannot be said to be its own endowment. A church is frequently spoken of as being "endowed," or as having no endowment; an endowed church is one to which is attached glebe land, tithe, or other income producing property. If the church itself, or the site on which it is built, is endowment, then every church must be an endowed church.

By confining the statutory interpretation of "endowment" to ss. 44 and 62, the only two sections where that word is used, the construction of the Act becomes plain; a rational meaning can be given to the expression "endowed foundation," and an intelligible distinction can be drawn between gifts which constitute endowment and gifts which do not—namely, a gift the income of which only is applicable by the charity is endowment; a gift of which the capital is applicable for the charity

(1) (1868) L. R. 3 C. P. 313.
(2) (1867) L. R. 2 Ch. 356.
(3) [1895] 1 Q. B. 749.

is not endowment, and, except for the purposes of two sections, no more than a voluntary subscription.

This is consistent with s. 48 of the Charitable Trusts Amendment Act, 1855, which emphasises the fact that the Acts are only to apply to "endowed" foundations.

As to s. 62, the reason why cathedral and collegiate churches are exempted, and parish churches are not, is because some cathedrals hold their revenues in trust to maintain a school, whereas parish churches have no trusts. Their revenues are the absolute property of the incumbents. Cathedral and collegiate churches, therefore, may be "charities" within s. 66, whereas parish churches are not: Finlason on the Charitable Trusts Acts, p. 3. This supplies a clue to the proviso. Sect. 62 consists of five exemptions, each beginning "this Act shall not apply," and a proviso which refers to "the said exemption." The "said exemption" must mean either the entire section or one of the five exemptions referred to. It cannot refer to the entire section, for that would include Roman Catholic schools, which is obviously not the intention; and it accordingly refers to that of cathedral and collegiate churches; but if it applies to the whole section, then "other schools" must be read ejusdem generis. The special words do not exhaust the genus: *Fenwick* v. *Schmalz.* (1) There are prebendal schools. The class referred to are schools maintained out of the revenues of an ecclesiastical corporation.

As to the Government grant, payments by boards of guardians and local authorities, these are all voluntary contributions. If they are not voluntary contributions, then they must be payments made under the terms of some contract; and a contract, being a chose in action, is property belonging to the charity, and is "endowment" within s. 62; and in that case the charity is one maintained partly by voluntary contributions and partly by income from endowment.

Ingle Joyce, for the Attorney-General. I take no part in the argument; I merely wish to point out the importance of the question as to the meaning of the proviso. There are thousands of registered places of worship with schools attached. If the

(1) L. R. 3 C. P. 313.

commissioners are right, all such schools are subject to their jurisdiction.

Cozens-Hardy, Q.C., in reply.

Cur. adv. vult.

Aug. 11. LINDLEY M.R. This case turns upon that very obscure section, the 62nd section of the Charitable Trusts Act, 1853.

Stirling J. has held that the exception at the end of that section does not include the schools mentioned in the petition, and that the consent of the Charity Commissioners to the presentation of the petition and the proposed mortgage was not necessary.

The Charity Commissioners have appealed from that decision, and they ask this Court to make a declaration that under the Charitable Trusts Act, 1853, the consent of the Charity Commissioners to the presentation of the petition and the proposed mortgage is necessary.

The Stockport Ragged, Industrial, and Reformatory School is maintained partly by voluntary subscriptions. It has payments made to it by boards of guardians and other boards for pupils who are sent to be educated there. It has a Government grant as well, and it has also certain landed property, and the object of the present application to the Court is to raise money by a mortgage of that part of this landed property which consists of the girls' school and the new boys' school.

I will first of all address myself to the main question on which the Charity Commissioners appealed, namely, what is the true construction of the proviso at the end of s. 62 of the Charitable Trusts Act, 1853.

The Charity Commissioners contend that by virtue of this proviso all schools are taken out of the exemptions enumerated in the section. Now, the section enacts that the Act shall not extend to certain universities, colleges, cathedrals, or collegiate churches, and so on, giving a long list of exemptions, amongst which are enumerated Roman Catholic charities or institutions, which is an important exemption; and at the end of the list there is this proviso: "Provided always, that the said exemption shall not extend to any cathedral, collegiate, chapter, or other schools."

The Charity Commissioners ask the Court to read the expression "other schools" in the largest possible sense, so as to exclude all schools whatever from the exemption, and therefore to bring them within their jurisdiction. I agree with the decision of Stirling J. that this cannot be the meaning of the section. There are two ways of reading it: one is that the exemption shall not extend to any school. The other way of reading it is that the exemption shall not extend to any cathedral, collegiate, chapter, or other schools more or less like them. Stirling J. has adopted the second construction, and it appears to me that this is the natural and proper construction. I am quite aware that there have been cases, such as *Anderson* v. *Anderson* (1) (to which I drew attention during the argument), where the Court has protested against pushing the doctrine of ejusdem generis too far. It is very often pushed too far; but I cannot conceive why the Legislature should have taken the trouble to specify in this section such special schools as cathedral, collegiate, and chapter, except to shew the type of school which they were referring to, and, in my opinion, "other schools" must be taken to mean other schools of that type.

If we were to adopt the other construction for which the counsel for the Charity Commissioners contend, and to hold that all schools were in 1853 and are now within their jurisdiction, we should, having regard particularly to the exemption of Roman Catholic charities and institutions, be running entirely contrary to the real meaning of the Legislature. I cannot help regarding this as the great point in the case, and upon it I think Stirling J. was perfectly right.

But another point has been raised which was not so much pressed below, and in fact seems to have been rather lightly passed over. Mr. Cozens-Hardy, for the Charity Commissioners, contends that the school is within their jurisdiction because it does not fall within any of the exemptions. There, for reasons which I will give, I think he is right. Passing over the universities, colleges, and so on, the first material exemption

(1) [1895] 1 Q. B. 749.

is in favour of a charity "wholly maintained by voluntary contributions." Having regard to the statements in the petition and the evidence as to how these schools are maintained, I do not think that they can be brought within that exemption. At all events, it is not proved that they can. Having regard to this Government grant, and to the fact that board schools and boards of guardians contribute to them, I feel great difficulty in saying that the schools come within this exemption.

Then, coming to the next one, "Where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof." I do not quite understand the words "where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment." Why cannot a charity be maintained by some other means? In other words, those two sources do not exhaust the whole of the income of a charity. Here we have got this case. This charity is unquestionably maintained partly by voluntary subscriptions. Is it maintained partly by income arising from any endowment?

Now "endowment" there, in accordance with *In re Clergy Orphan Corporation* (1), must mean some endowment not arising from the investment of voluntary subscriptions. It is said by Mr. Cozens-Hardy, and in point of language I can see no answer to it, that this school land and school buildings do not yield income, and therefore you cannot say that this charity is maintained partly by income arising from any endowment. There is no income from endowment if you read the word "endowment" in that narrow sense. As I say, I do not see the answer to that on the words; but if that is the true mode of interpreting the expression "partly by voluntary subscriptions and partly by income arising from any endowment," and you hold that this school is not within the exemption, what do you do? You throw the whole school under the jurisdiction of the Charity Commissioners, and give

(1) [1894] 3 Ch. 145.

them power over the voluntary subscriptions, which is a result very formidable, and certainly one not contemplated by the Act of Parliament, and I should say contrary to what is obviously meant, which is that the Charity Commissioners shall not have jurisdiction.

If in order to avoid that startling result one puts an artificial sense on the word "income," although there is none, by treating the institution as occupying the lands and schools at an occupation rent, receiving it on the one hand and paying it on the other—if you look at it in that way, then you bring the endowment within the jurisdiction of the Charity Commissioners, because, subject to certain exemptions, they are to have jurisdiction over the income from the endowment; and further, if you put that forced construction on the language in order to escape from the consequences which flow from the other construction, then it will follow that the Charity Commissioners have the power and the right to be consulted about this mortgage.

I do not propose at present to decide the very knotty point whether the Charity Commissioners would have general power over the voluntary subscriptions of schools like this. I see the difficulty, but I leave it until it arises. Construe the clause as you will, it appears to me the Charity Commissioners ought to be consulted about this particular mortgage. Therefore, although I agree with Stirling J. upon what I call the great point of the interpretation of the proviso, I think he has inadvertently fallen into a mistake in saying it follows that in this case the Charity Commissioners ought not to be consulted. The consequence is that his order must be varied in accordance with the notice of appeal, and there must be a declaration that under the Charitable Trusts Act, 1853, the consent of the Charity Commissioners to the presentation of the petition and the proposed mortgage is necessary.

Chitty L.J. I am of the same opinion. The point that was seriously argued before Stirling J. was upon the proviso at the end of the 62nd section. If the proviso is applied it takes the charity out of the exemption, and therefore leaves it, under

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the main provisions of the 62nd section, within the jurisdiction of the commissioners. Upon the construction of the proviso I entertain no doubt whatever. The proviso is that the exemption shall not extend to "any cathedral, collegiate, chapter, or other school." It appears to me that, reading those words by themselves, and seeing what a number of endowed schools there are in the country, it cannot be the intention of the Legislature, when it begins by speaking of "cathedral, collegiate, chapter" in that way, and then goes on to "or other schools," that all other schools of whatever character or denomination, including Roman Catholic and the like, shall be included within the proviso, and therefore taken out of the exemption. The reason why "cathedral" and "collegiate" are put in is plain from the opening part of the 62nd section, which relates to cathedral or collegiate churches, and takes them out of the general jurisdiction. Now, there are schools attached to cathedral or collegiate churches, and such of those schools as are charities are intended to be put back into the jurisdiction. The class of schools mentioned, namely, "cathedral, collegiate, or chapter," are of the most peculiar and special class of schools connected with the Church of England. I do not stay to say what is meant by "chapter." There seems to be some difficulty about it, whether there is in this country such a thing as a chapter school. The word may have some meaning counsel has not explained, but that is a class of school indicated. I am of opinion that "other schools" cannot be read by itself, but must be schools of the like class. I entirely agree with Stirling J.'s observations on this point, and I shall not weaken them by repeating them.

Then, with regard to the other point which was mentioned to Stirling J., but not seriously argued, I think the commissioners are right. With the intention of founding a school, land was taken by conveyance to certain persons who did not declare the trusts thereof. The money for the purpose of building the school was subscribed by the Marquis of Westminster, as he then was, and some other gentlemen, and the school was duly erected.

After the school had been erected, a conveyance was made to trustees by the deed of June, 1866, and under that deed the land with the buildings thereon became and was a permanent endowment, an endowment which the trustees were no longer able to treat as being income. The trusts declared by the deed were, first, that the building should be used as a school. Then there was a power of sale with a direction to lay out the money in purchasing a better site for a school, but the land proposed to be thus acquired was subject to the same trust as the original land.

In these circumstances the trustees had a power of sale which they have purported to exercise. They have agreed to sell the land and school above mentioned, and they purpose with the purchase-money when they get it, and with the money they are going to raise on mortgage, to provide and build a new boys' school.

Now, it seems to me, without going through this very troublesome 62nd section, that the commissioners are right, at any rate as to their consent being required; and it is quite enough for the decision of the case that here there was a fixed permanent endowment. Now, the Charity Commissioners contend that their consent to the presentation of this petition was requisite under the 17th section of the Act of 1853—a consent which I understand they have given, but without prejudice to the appeal.

I am not much disposed to unravel this tangled skein of the 62nd section, and the only observation I make about it is that I conceive that the Legislature did not intend that any charity that was maintained by voluntary contributions should, so far as it was so maintained, be within the jurisdiction of the commissioners; but it is not necessary in my opinion to dive further into the section or try to find its meaning if the commissioners are right on the simple point (and on that my decision goes) that there is here a permanent endowment in the shape of land which the trustees cannot treat as income.

COLLINS L.J. I am of the same opinion.

Solicitors: *Clabon; Andrew, Wood & Purves, for John W. Johnston, Stockport; Treasury Solicitor.*

W. W. K.

In re BATT & CO.'S REGISTERED TRADE-MARKS.
In re CARTER'S APPLICATION.

THE MASTER OF THE ROLLS at the sitting of the Court of Appeal on November 4, 1898, said that a misapprehension had arisen with reference to certain remarks made by his Lordship during the hearing of this case, noted W. N. (1898) 77 (8), and reported [1898] 2 Ch. 442. The first paragraph there given, namely, "It is desirable that solicitors should know that, on an appeal in cases where evidence has been taken orally in the Court below, it is their duty to apply in good time for the judge's notes of evidence," was correct; but the concluding words should read as follows: "If they do so, this Court will apply to the judge for a copy of his notes; but if, as frequently happens, a copy of the notes is applied for just before the appeal comes on for hearing, there is no time to obtain a copy for the use of the Court of Appeal, which leads to great inconvenience."

See the Annual Practice for 1898, p. 1045, and the Annual Practice for 1899, p. 847; Order LVIII., r. 11, and the notes thereto.

W. W. K.

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Sched. I., clause (*c*), of the Arbitration Act, 1889, provides that "The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission. . . ." The expression "called on to act" in the above clause means called on to enter on the substantial business of the reference, and not merely called on to do some specific thing connected with the arbitration, such as to appoint an umpire. BARING-GOULD *v.* SHARPINGTON PICK AND SHOVEL SYNDICATE - - - **Stirling J. 633**

2. —— *Submission — Practice — Action—Application to Stay Proceedings—Time—"Step in the Proceedings"—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

The mere filing of affidavits in answer to a motion for a receiver in an action for dissolution of partnership is not a "step in the proceedings" within s. 4 of the Arbitration Act, 1889, the taking of which will preclude the defendant from moving to refer the case to arbitration under a

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ASSIGNMENT OF DEBT—*Debtor and Creditor—Negotiable Instrument—Equitable Assignment of Debt—Notice.*

Notice to a debtor, who has given a negotiable instrument for his debt, that the debt has been assigned by the creditor, can be disregarded by the debtor even if the creditor who has assigned the debt is still the holder of the negotiable instrument.

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Although in ordinary cases the practice of a proving creditor to lump together debts and securities is usual and proper, yet where the debts are distinct in substance, with different rights over as against third parties, or with different securities, it is the duty of the trustee in bankruptcy to insist that proofs shall not be made for a lump sum, and to require the proving creditor to distinguish and specify the particular debts and the value of the respective securities for the same.

Where a creditor held four separate bills of exchange, A, B, C, and D, which he had lumped together in one proof, and had received more than 20*s.* in the pound upon bills B and D, but less than the amount secured by bills A and C, so that he had not been thereby paid the total amount of his proof:—

Held, that he was not entitled to retain bills B and D and all moneys received thereon until the aggregate proof in respect of all four bills had been paid in full, but that the trustee in bankruptcy was entitled to have the surplus over 20*s.* in the pound in respect of each bill handed back to him. *In re* Morris. James *v.* London and County Banking Company - Romer J. 413

2. —— *Receiver—Title of Official Receiver under Bankruptcy Act*, 1883—*Registration in Middlesex—"Conveyance"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 20, 54, 121—*Middlesex Registry Act*, 1708 (7 *Anne, c.* 20), *s.* 1.

An order of adjudication in bankruptcy is not a "conveyance" within the meaning of the Middlesex Registry Act (7 Anne, c. 20), s. 1.

A debtor entitled to land in Middlesex was adjudged bankrupt, and an order was made under s. 121 of the Bankruptcy Act, 1883, that his estate should be administered in a summary way, so that no appointment of a trustee was made. He never disclosed to the official receiver the fact of his having the land, and he subsequently mortgaged it to a mortgagee who forthwith registered his mortgage:—

Held (reversing the decision of Kekewich J.), that the title of the official receiver was not postponed to that of the mortgagee by reason of the order of adjudication not having been registered. *In re* Calcott and Elvin's Contract C. A. 460

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BUILDING CONTRACT—*Non-completion before Death of Landowner—Devise of the Land—Right of Devisee to have the Contract completed at Cost of Landowner's Personal Estate.*

A testator having in his lifetime entered into a contract for the erection of buildings on land belonging to him:—

Held, on the authority of *Cooper* v. *Jarman*, (1866) L. R. 3 Eq. 98, that, the buildings not having been completed before the testator's death, the devisee of the land was entitled to have them

BUILDING CONTRACT—*continued.*

completed at the cost of the testator's personal estate.

The testator had also entered into a contract for the erection of buildings upon land belonging to the devisee by an independent title, and these buildings were not completed before the testator's death:—

Held, that *Cooper* v. *Jarman* did not apply, and that, it not being shewn that the devisee had given valuable consideration for the contract, she was not entitled to have the buildings completed at the cost of the personal estate. *In re* Day. Sprake *v.* Day - - - **North J. 510**

BUILDING SCHEME—*Restrictive Condition—Positive Covenant—Implied Negative Stipulation.*

Building land described as adapted for shops and business premises was put up for sale by auction subject to a condition that the purchasers of certain specified lots should respectively covenant with the vendors to erect within a given time on each of the lots respectively purchased by them a shop and dwelling-house of a given minimum value, but the lots in question remained unsold:—

Held, applying the test in *Oriental Steamship Co.* v. *Tylor*, [1893] 2 Q. B. 518, 527, that, having regard to the absence of any express provision as to the maintenance of the contemplated buildings when erected as shops and dwelling-houses, no negative stipulation ought to be implied that nothing but shops and dwelling-houses should be erected on the lots in question; consequently, that the vendors could not be restrained, at the instance of the purchaser of an adjoining lot, from erecting on the unsold lots a fire-engine station of a value exceeding the aggregate value of the contemplated buildings, there being no such departure from the condition as to render the whole transaction futile. Holford *v.* Acton Urban District Council **Stirling J. 240**

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BURIAL—*Purchase of Addition to Burial Ground—Approval by Secretary of State—Burial Act*, 1852 (15 *&* 16 *Vict. c.* 85), *ss.* 25, 26—*Burial Act*, 1853 (16 *&* 17 *Vict. c.* 134), *s.* 6.

The burial board of Portsmouth, where by Order in Council no new burial ground was to be opened without the previous approval of one of the Secretaries of State, contracted in 1889 with the consent of the vestry for the purchase of a piece of land for the purpose of adding to their existing cemetery. The purchase was not to be completed till June, 1896. In the meantime no interest was to run, and the vendor was to be at liberty to remove the clay and make bricks on the land. In 1895 the property and liabilities of the board were transferred to the corporation. Shortly before the time for completion the corporation applied to the Home Secretary for his approval of the land as a burial ground, which he refused to give. The corporation then declined to complete, and the vendor sued for specific performance or damages:—

Held, by the Court of Appeal, affirming the decision of Byrne J. on this point, that s. 6 of the Act of 1853, which provides that no new burial ground shall be "provided and used" within the limits there specified without the approval of a Secretary of State, applied to an addition to an existing burial ground.

But held, reversing the decision of Byrne J., that the section did not prohibit the contracting to purchase land with the consent of the vestry for the purpose of a burial ground without the approval of a Secretary of State, and that the contract was binding and the vendor entitled to damages for the breach of it, he not insisting on specific performance. Ward *v* Portsmouth Corporation - - - - **C. A. 191**

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—— *Blake* v. *Gale*, (1886) 32 Ch. D. 571, 577, distinguished - - - - 562
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—— *Boynton* v. *Boynton*, (1879) 4 App. Cas. 733, principle of, applied - - 684
See Company. 7.

—— *Bristol Athenæum, In re*, (1889) 43 Ch. D. 236, discussed - - 72, 83
See Scientific Society. 1, 2.

—— *Cooper* v. *Jarman*, (1866) L. R. 3 Eq. 98, referred to - - - - 510
See Building Contract.

—— *Coxon* v. *Gorst*, [1891] 2 Ch. 73, discussed
See Company. 6. 405

—— *Croft* v. *Rickmansworth Highway Board*, (1888) 39 Ch. D. 272, followed - 515
See Local Government.

—— *Crompton* v. *Jarratt*, (1885) 30 Ch. D. 298, distinguished - - - 545
See Ecclesiastical Law.

—— *Crookhaven Mining Co., In re*, (1866) L. R. 3 Eq. 69, followed - - - 405
See Company. 6.

—— *Dawson, In re*, (1888) 39 Ch. D. 155, followed - - - - - 567
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—— *Devonshire (Duke of)* v. *O'Connor*, (1890) 24 Q. B. D. 468, followed - - 358
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—— *Dicker* v. *Angerstein*, (1876) 3 Ch. D. 600, explained and distinguished - 230
See Vendor and Purchaser. 4.

—— *Ehrman* v. *Bartholomew*, [1898] 1 Ch. 671, followed - - - - 451
See Restraint of Trade.

—— *England, In re*, [1895] 2 Ch. 820, applicable
See Limitations, Statute of. 1. 499

—— *Ferrand* v. *Hallas Land and Building Co.*, [1893] 2 Q. B. 135, followed and applied - - - - - 515
See Local Government.

—— *Finlay* v. *Seaton*, (1808) 1 Taunt. 210, discussed - - - - 145
See Practice. 3.

—— *Forman* v. *Dawes*, (1843) 11 M. & W. 730, discussed - - - - 145
See Practice. 3.

—— *Foxwell* v. *Van Grutten*, [1897] 1 Ch. 64, considered - - - - 573
See Practice. 5.

—— *Gas Light and Coke Co.* v. *Vestry of St. Mary Abbotts*, (1885) 15 Q. B. D. 1, distinguished - - - - 603
See Highway.

—— *Geddis* v. *Bann Reservoir Proprietors*, (1878) 3 App. Cas. 430, distinguished and explained - - - - 603
See Highway.

—— *Gregson, In re*, [1893] 3 Ch. 233, approved
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—— *Hodgson, In re*, (1885) 31 Ch. D. 177, 188, followed - - - - 295
See Practice. 4.

—— *Jee* v. *Audley*, (1787) 1 Cox, 324, followed
See Will. 567

—— *Jennings* v. *Ward*, (1705) 2 Vern. 520, explained and distinguished - 307
See Mortgage. 2.

—— *Kerr* v. *Preston Corporation*, (1876) 6 Ch. D. 463, considered - - - 331
See Jurisdiction.

—— *King* v. *Hoare*, (1844) 13 M. & W. 494, followed - - - - 295
See Practice. 3.

—— *Lashley* v. *Hog*, (1804) 4 Pat. 581, considered and followed - - 60
See Domicil.

—— *Lister* v. *Leather*, (1858) 4 K. & J. 425, discussed - - - - 145
See Practice. 3.

—— *London and Caledonian Marine Insurance Co., In re*, (1879) 11 Ch. D. 140, discussed - - - - 405
See Company. 6.

—— *London, Brighton and South Coast Ry. Co.* v. *Truman*, (1885) 11 App. Cas. 45, inapplicable - - - - 614
See Gas Company.

—— *Lowman, In re*, [1895] 2 Ch. 348, explained and distinguished - - - 567
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—— *Mainland* v. *Upjohn*, (1889) 41 Ch. D. 126, discussed and applied - - 307
See Mortgage. 2.

—— *Maynards, Limited, In re*, [1898] 1 Ch. 515, not followed - - - 556
See Company. 5.

—— *Meade's Settled Estates, In re*, [1897] 1 I. R. 121, distinguished - - - 96
See Settled Land. 3.

—— *Minehead Local Board* v. *Luttrell*, [1894] 2 Ch. 178, followed and applied - 515
See Local Government.

—— *Newton* v. *Anglo-Australian Investment, Finance and Land Co.*, [1895] A. C. 244, commented on, and explained - 28
See Company. 1.

—— *Oriental Steamship Co.* v. *Tylor*, [1893] 2 Q. B. 518, 527, followed - - 240
See Building Scheme.

—— *Pinto Silver Mining Co., In re*, (1878) 8 Ch. D. 273, discussed - - 405
See Company. 6.

—— *Ponsonby, In re*, (1842) 3 D. & War. 27, explained - - - - 419
See Lunacy. 3.

—— *Pyle Works, In re*, (1890) 44 Ch. D. 534, commented on, and explained - 28
See Company. 1.

—— *Richards, In re*, (1890) 45 Ch. D. 589, considered - - - - 347
See Mortgage. 1.

—— *Salmon, In re*, (1889) 42 Ch. D. 351, considered - - - - 250
See Trustee. 3.

—— *Stannard* v. *Vestry of St. Giles, Camberwell*, (1882) 20 Ch. D. 190, considered 331
See Jurisdiction.

—— *Streatham and General Estates Co., In re*, [1897] 1 Ch. 15, approved - 149
See Company. 2.

—— *Tibbits' Settled Estates, In re*, [1897] 2 Ch. 149, distinguished - - - 96
See Settled Land. 3.

—— *Williams* v. *Glenton*, (1866) L. R. 1 Ch. 200, observed upon - - - 211
See Vendor and Purchaser. 2.

—— *Wrotesley* v. *Adams*, (1558) Plowd. 191, applied - - - - 551
See Landlord and Tenant. 1.

—— *Young and Harston's Contract, In re*, (1885) 31 Ch. D. 168, 174, observed upon 211
See Vendor and Purchaser. 2.

CHAPLAIN—Salary of—Income tax—Charitable institution - - - - 669
See Revenue. 3.

CHARITY—*Charity Commissioners—Consent—Jurisdiction—Industrial School—Charitable Trusts Act*, 1853 (*16 & 17 Vict. c.* 137), *ss.* 62, 66 —*Proviso as to extent of Exemption in s.* 62—"*Any Cathedral, Collegiate, Chapter, or other Schools*"—*Ejusdem Generis Rule—Endowment.*

The proviso at the end of s. 62 of the Charitable Trusts Act, 1853, excluding "any cathedral, collegiate, chapter, or other schools" from the "exemption" contained in the section, does not

CHARITY—*continued.*

extend to all schools of whatever description, but only extends to the schools there mentioned, and to schools of a similar character.

The decision of Stirling J., [1898] 1 Ch. 610, affirmed.

The trustees of an industrial school maintained by voluntary contributions, Government grants, contributions from school boards, boards of guardians, and other public authorities, and possessed of lands and buildings occupied by the school, presented a petition under Sir Samuel Romilly's Act (52 Geo. 3, c. 101) asking for the sanction of the Court to a proposed mortgage of part of the school lands and buildings:—

Held, by the Court, that the consent of the Charity Commissioners to the presentation of the petition and to the proposed mortgage was necessary, per Lindley M.R., upon the construction of s. 62; and, per Chitty L.J., having regard to the nature of the property proposed to be mortgaged.

The order of Stirling J. reversed.

Government grants, and contributions by school boards, boards of guardians, and other public authorities to an industrial school, are not voluntary contributions within s. 62. *In re* Stockport Ragged, Industrial, and Reformatory Schools - - - - **C. A. 687**

2. —— *Churchwardens — Income of Charity Estates—Banking Account—Anticipation of Rents — Charge on Charitable Property — Charitable Trusts Amendment Act*, 1855 (18 *&* 19 *Vict. c.* 124), *s.* 29.

Estates held on old parochial trusts, the origin of which was unknown, were in 1865 vested in trustees by a deed of appointment of new trustees upon trust to permit and suffer the churchwardens of St. B., in the City of London, to receive and take the rents as the same should from time to time grow due and be payable as formerly had been used, and for such charitable uses, intents, and purposes as the same had been usually employed by the parishioners of the said parish, whether in or about the repairs of the church, the relief of the poor of the parish, or any other of the public affairs of the parish. The churchwardens kept an account with a bank headed as the account of the churchwardens, not mentioning their names, and for many years this account had been kept as a continuous account, an adverse balance at the end of one year being paid out of rents of subsequent years. From 1885 to 1888 the then churchwardens, there being a temporary diminution of income, obtained from the bank, without the sanction of the Charity Commissioners, advances amounting to 3000*l.*, which were carried to the credit of the churchwardens in the account. In 1891 a scheme by the Charity Commissioners under the City of London Parochial Charities Act, 1883 (46 & 47 Vict. c. 36), came into effect, by which the estates were vested in the Official Trustee of Charity Lands, and the administration of the rents in the Trustees of the London Parochial Charities. The bank then sued the individual churchwardens in whose time the advances had been made for the advances; and the churchwardens brought an action against the Official Trustee of Charity Lands and the Trustees of the London

CHARITY—*continued.*

Parochial Charities to be indemnified out of the rents against the claims of the bank:—

Held, by Romer J., that on the construction of the deed appointing new trustees, the churchwardens for the time being could only receive the rents as they became due and apply them, and had no power to anticipate the income so as to have a claim on the future income, and that their claim therefore failed:

Held, by the Court of Appeal, that whether this was a correct view or not the churchwardens' claim was defeated by the Charitable Trusts Amendment Act, 1855, s. 29, which prohibits any sale, mortgage, or charge of a charity estate without the approval of the Charity Commissioners. Fell *v.* Official Trustee of Charity Lands - - - - - **C. A. 44**

3. —— *Gift for Political and Religious Purposes.*

The vicar of a parish by his will dated in 1897 devised to the vicar for the time being a building used as a village club and reading-room "to be maintained for the furtherance of Conservative principles and religious and mental improvement and to be kept free from intoxicants and dancing":—

Held, a good charitable gift. *In re* Scowcroft. Ormrod *v.* Wilkinson **Stirling J. 638**

—— Salary of chaplain—Income tax - **669**
See Revenue. 3.

CHATTELS—Mounds of refuse produced in iron manufacture—Minerals - - **301**
See Mine.

CHILD-BEARING—Woman past—Advancement clause — "Expectant or presumptive share"—Impossibility of issue - **567**
See Will.

CHURCHWARDENS—Income of charity estates —Anticipation of rents — Charge on charitable property - - **44**
See Charity. 2.

CLOSURE—Meeting of shareholders - **469**
See Company. 4.

COMMUNITY OF GOODS—International law— —Marriage — Change of domicil — —Movable goods—French law - **60**
See Domicil.

COMPANY—*Debentures — Priority — Debenture-holders—Winding-up—Power to Charge Uncalled Capital—Resolution under Companies Act*, 1879 (42 *&* 43 *Vict. c.* 76), *s.* 5.

A limited company having, under its articles, power to issue debentures charging its assets including its uncalled capital, in October, 1892, passed a special resolution under s. 5 of the Companies Act, 1879, declaring that 5*l.* per share remaining uncalled up upon its ordinary 10*l.* shares should not be capable of being called up "except in the event of and for the purpose of the company being wound up." In June, 1894, when 5*l.* 15*s.* remained uncalled up, the company issued debentures charging all its undertaking and property, "including its uncalled capital for the time being," with the principal money and interest secured by the debentures. The company

COMPANY—*continued.*

was afterwards ordered to be wound up, and the question arose whether the debentures issued by the company created a valid first charge upon the 5*l.* per share reserved capital so as to entitle the debenture-holders to payment thereout in priority to the other creditors and the cost of winding up:—

Held, by the Court of Appeal, affirming the judgment of Wright J., that, upon the true construction of s. 5 of the Act of 1879, the company had no power to create any charge on that portion of its capital which, in accordance with the resolution passed under that section, could only be called up "in the event of and for the purposes of the company being wound up."

The Companies Act, 1879, and the decisions in *In re Pyle Works*, (1890) 44 Ch. D. 534, and *Newton* v. *Anglo-Australian Investment, Finance and Land Co.*, [1895] A. C. 244, commented on, and explained. *In re* Mayfair Property Company. Bartlett *v.* Mayfair Property Company - - - - - C. A. 28

2. —— *Debentures—Property—Charge on all Present and Future "Property" of the Company—Winding-up of Company.*

A limited company having under its articles of association power to borrow money upon debentures charging its "property," both present and future, including its uncalled capital, issued debentures charging its undertaking "and all the property to which it now is, or shall at any time hereafter become entitled." The company afterwards went into liquidation; and it was held by the Court of Appeal that the expression "property" in the debentures did not include the capital of the company uncalled up at the commencement of the liquidation.

The decision of Stirling J. affirmed; and that of Chitty J. in *In re Streatham and General Estates Co.*, [1897] 1 Ch. 15, approved. *In re* Russian Spratts Patent, Limited. Johnson *v.* Russian Spratts Patent, Limited C. A. 149

3. —— *Promoters—Secret Profit by Promoters—Duty of Disclosure.*

A limited company was being wound up, part of whose property consisted of land and buildings known as "Olympia," used for exhibitions, which were subject to debentures for 100,000*l.* and a mortgage for 10,000*l.*, the incumbrances exceeding the value of the property. On January 19, 1893, a syndicate was formed to buy Olympia with a view to a resale to a company or to some other purchaser. The syndicate agreement provided for the formation by the subscribers of a fund for that purpose to be vested in trustees, this fund to be applied in paying—(1.) the purchase-money; (2.) the expenses of forming the company. If the company was formed, four persons there named consented to become directors. The above four were nominated trustees, with power to do whatever was necessary to buy and resell Olympia and to promote and register the company, and power to purchase as an interim investment any debentures of the old company. It was provided that the sale to the proposed company or any other purchaser should be subject to and with the benefit of two agreements of even date, one of which was for a supply of refreshments to the proposed company by a firm in which two of the above four were interested, and the other was that a certain firm should be advertising agents of the new company. Each of those two agreements expressed that it was made by the syndicate for themselves, and so far as they could on behalf of the proposed company or other purchaser. The syndicate in January and the early part of February bought up the mortgage and some of the debentures for sums much below the amount they realized, and thus made a profit of 20,000*l.* On February 9 the syndicate bought Olympia for 140,000*l.* On March 20, 1893, an agreement was made between the syndicate trustees, as vendors, and Close, as trustee for the intended company, by which the vendors agreed to sell Olympia to the proposed company for 180,000*l.*; and it was declared by clause 7 that the validity of the agreement should not be impeached on the ground that the vendors as promoters or otherwise stood in a fiduciary relation to the company, nor should the vendors be required to account for any profit made, or to be made, by them by the purchase of any debentures or other charges on the property. On the same day the new company was registered, its objects as stated in the memorandum being (inter alia) to purchase Olympia, and to carry into effect the last-mentioned agreement. The articles ratified the agreement, and directed the directors to carry it into effect, as also the two refreshment and advertising contracts. The four persons who were trustees of the syndicate were appointed by the articles the first directors. The prospectus referred to the existence of the contract with the vendors and stated the amount of the purchase-money but not the special terms. It also stated that any profits "made by the syndicate from interim investments were excluded from the sale to the company." The directors adopted the contract with Close and the agreements as to refreshments and advertising, and the syndicate received the 40,000*l.* disclosed profit on the sale of the property, and also the 20,000*l.* profit on the debentures and mortgage. Of this 20,000*l.* the four last-mentioned persons received as their share 6341*l.* The company being in course of winding-up, the official liquidator took out a summons under the Companies (Winding-up) Act, 1890, s. 10, against one of the four to compel him to replace the 6341*l.* as a secret profit for which the four were jointly and severally liable:—

Held, by Wright J., that the four stood in no fiduciary relation to the company at the time at which they purchased the debentures and mortgage, and that they were not accountable for the profits made on them:—

Held, on appeal, that the syndicate trustees, having by the syndicate agreement of January 19 provided for the formation of a company, owed to it when formed the duty not to make a profit out of it without informing it of the fact, and giving it the opportunity of declining to allow such profit to be made at its expense. That here there was no sufficient disclosure as to the profits on the debentures, a reference to documents by the inspection of which it might be ascertained that profits had been made being insufficient; that clause 7 of the agreement with Close was not

COMPANY—*continued.*

binding on the company, as the directors who adopted that agreement were not an independent body, but four persons who were to share in the profit complained of; and that the fact that the company, which had been kept in the dark as to the matter complained of, could not now rescind, was not a bar to relief: *Held*, therefore, that the four were jointly and severally liable to replace the 6341*l*. *In re* Olympia, Limited **C. A. 153**

4. —— *Sale of Assets—Amalgamation—Distribution of Consideration—Meeting of Shareholders—Closure.*

The objects of the A. Company as stated by art. 3 of its memorandum were (inter alia) (*a*) to raise capital and invest it in such bonds, stocks, and securities as therein mentioned; (*i*) to sell any part of the assets and to accept the consideration in cash, shares, or other securities, and to divide any assets of the company in specie among its shareholders; (*o*) to amalgamate with any persons, companies, or firms carrying on business of a like nature. The D. Company carried on a similar business. The A. Company agreed with the D. Company to sell to the D. Company all its assets (except 3325 2*l*. shares in the D. Company which the A. Company held) for 60,991*l*., to be satisfied as to 59,736*l*. by allotment of 29,868 fully paid-up shares of 2*l*. each in the D. Company, and the balance of 1255*l*. in cash or fully paid-up shares at the option of the A. Company. It was provided by the agreement that the shares so allotted and the shares in the D. Company already held by the A. Company were to be divided among the shareholders of the A. Company in manner therein mentioned. It was doubtful whether the mode of division was not illegal as interfering with the rights of the shareholders under the memorandum and articles:—

Held, that the proposed sale being a sale of the assets of the A. Company with a substantial exception was within (*i*), and that the transaction was also warranted by (*o*) as being an amalgamation:

Held, also, that the proposed division of shares, being a matter with which the D. Company had nothing to do, did not, even if illegal, affect the validity of the agreement for sale, and that an interlocutory injunction to prevent the A. Company from carrying the agreement into effect had been properly refused on an undertaking by the A. Company not to divide the shares till after the trial otherwise than in accordance with the rights of the shareholders under the memorandum and articles.

At a meeting of shareholders it is not competent to the majority to come determined to vote in a particular way on any question, and to refuse to hear any arguments to the contrary; but when the views of the minority have been heard, it is competent to the chairman with the sanction of a vote of the meeting to declare the discussion closed and to put the question to the vote.

At a meeting held to confirm a resolution passed by the requisite majority at a former meeting so as to make it a special resolution, it is irregular to propose an amendment to that resolution.

COMPANY—*continued.*

Decision of Stirling J. affirmed. Wall *v.* London and Northern Assets Corporation **C. A. 469**

5. —— *Shares—Issue of fully paid-up Shares—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25 *—Registered Contract—Statement of Consideration—Sufficiency—Property purchased described merely by reference to prior Contract.*

Where the contract registered under s. 25 of the Companies Act, 1867, on the issue of fully paid-up shares described the property sold merely in a recital of a prior contract entered into between the vendor and a trustee for the company as "certain leasehold messuages, shops, and premises," together with "the goodwill of the several businesses carried on by the vendor upon the same," together with the "machinery, plant, horses, vans, carts, fixtures, and fittings used in connection with the said several businesses":—

Held, that the consideration for the issue of the shares was sufficiently stated.

In re Maynards, Limited, [1898] 1 Ch. 515, not followed. *In re* S. Frost & Co., Limited **Romer J. 556**

6. —— *Voluntary Winding-up—Dissolution—Jurisdiction—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 142, 143—*Costs—Taxation—Costs unnecessarily incurred—Plaintiff ordered to give Security for Costs—Stay of Proceedings—Affidavits filed by Defendant during Stay.*

Notwithstanding the dissolution of a company by reason of the expiration of three months from the registration of the return made by voluntary liquidators to the Registrar of Joint Stock Companies under s. 143 of the Companies Act, 1862, the Court has jurisdiction against the company in a proceeding commenced after the date of the registration, but before the end of the three months, even though the hearing does not take place till after the end of the three months.

In re Crookhaven Mining Co., (1866) L. R. 3 Eq. 69, followed.

The authority of that case has not been impeached by *In re Pinto Silver Mining Co.*, (1878) 8 Ch. D. 273; *In re London and Caledonian Marine Insurance Co.*, (1879) 11 Ch. D. 140; or *Coxon* v. *Gorst*, [1891] 2 Ch. 73.

An order was made dismissing an action with costs, because the plaintiffs had failed to comply with a previous order that they should give security for the costs of the action. That order contained the usual stay of proceedings by the plaintiffs until the security should be given. Immediately before the order for security was made, the plaintiffs' motion for an injunction had been ordered to stand over for a fortnight, the defendant undertaking to deliver to the plaintiffs copies of his affidavits within ten days. In pursuance of this undertaking the defendant prepared his affidavits during the stay of proceedings by the plaintiffs. On the taxation of costs under the order dismissing the action, the taxing master held that the defendant ought not to be allowed the costs of his affidavits, on the ground that they ought not to have been prepared during the stay of proceedings:—

Held, that the taxing master had acted on a

COMPANY—*continued.*

wrong principle, and that the costs of the affidavits ought not to have been disallowed upon that ground. Whiteley Exerciser, Limited *v.* Gamage - - - - North J. 405

7. —— *Winding-up—Costs of outside Litigation—Action commenced before Winding-up.*

While a company was a going concern it commenced an action against B. The company afterwards passed an extraordinary resolution for a voluntary winding-up, which was continued under the supervision of the Court. The liquidators obtained the leave of the winding-up Court to continue the action, but B. obtained judgment in the action against the company with costs:—

Held, that the principle of *Boynton* v. *Boynton*, (1879) 4 App. Cas. 733, applied, and that as the liquidators had adopted the action ab initio, B. was entitled to be paid all his costs in full, and not merely the costs as from the commencement of the winding-up with liberty to prove for the costs previously incurred. *In re* London Drapery Stores - - - - Wright J. 684

8. —— *Winding-up—Creditor-Contributory—Insolvent Company holding Shares—Set-off of Debt against Calls—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 38—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 16, 38, 101—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.

The G. Company, Limited, held shares in the A. Company, Limited, and before either company went into liquidation calls were made on the shares, and the A. Company became indebted to the G. Company for money lent.

The A. Company having been ordered to be wound up by the Court and the G. Company, which was insolvent, having passed an extraordinary resolution for voluntary winding-up, Wright J. held that s. 10 of the Judicature Act, 1875, did not enable the liquidator of the G. Company to set off the debt against the calls: [1898] 1 Ch. 691:—

Held, subsequently, that, in the winding-up of the A. Company the G. Company could not take any dividend on the debt until it had paid up all calls in the winding-up of the A. Company. *In re* Auriferous Properties, Limited (No. 2) Wright J. 428

—— Assignment of debts—Conditional payment—Effect of giving cheque or bill of exchange - - - - 680
See Trade Debt.

—— Literary and Scientific Institution 72, 83
See Scientific Society. 1, 2.

COMPENSATION—Covenant running with land—Covenant for quiet enjoyment—Injunction—Damages - - 394
See Railway. 1.

COMPOUND SETTLEMENT—Appointment of trustees of—Sale by tenant for life 96
See Settled Land. 3.

CONDITION—Jurisdiction—Conditional devise to lunatic—Election—Performance of condition by committee - - 378
See Lunacy. 1.

—— Restrictive condition—Positive covenant—Implied negative stipulation - 240
See Building Scheme.

CONDITION PRECEDENT—"Subject to approval of form of agreement"—Mistake—Rescission—"Wilful default" - 128
See Vendor and Purchaser. 3.

CONDITIONAL PAYMENT—Debt—Effect of giving cheque or bill of exchange 680
See Trade Debt.

CONDITIONS OF SALE—Power to rescind—Effect of commencing litigation—Costs
See Vendor and Purchaser. 1. 285

CONFLICT OF LAWS.
See Domicil.

CONSENT—Charity Commissioners—Jurisdiction—Industrial school - - 687
See Charity. 1.

CONSIDERATION—Sufficiency—Issue of fully paid-up shares—Registered contract
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CONSOLS—Transfer—Form of order—Lunatic sole trustee—Vesting order - 324
See Lunacy. 2.

CONTRACT—Hiring and service—Severable covenant—Injunction - - 451
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—— Issue of fully paid-up shares—Registered contract—Consideration—Sufficiency
See Company. 5. 556

—— Non-completion before death of landowner—Right of devisee to have contract completed at cost of landowner's personal estate - - - - 510
See Building Contract.

—— Sale of lands - - 211, 230, 285
See Vendor and Purchaser. 1, 2, 4.

CONTRIBUTORY—Creditor-contributory—Insolvent company holding shares—Set-off of debt against calls—Winding-up of company - - - - - 428
See Company. 8.

CONVEYANCE—Registration in Middlesex—Title of official receiver under Bankruptcy Act, 1883 - - - 460
See Bankruptcy. 2.

CONVEYANCING AND LAW OF PROPERTY—Mortgagee-vendor—Statutory power of Sale—Defective exercise—Title - 230
See Vendor and Purchaser. 4.

COSTS—Conditions of sale—Power to rescind—Effect of commencing litigation - 285
See Vendor and Purchaser. 1.

—— Judgment against one of two joint debtors—Effect as regards the other—Pleading
See Practice. 4. 295

—— Mortgage—Negotiating loan—Solicitors' remuneration - - - 538
See Solicitor. 1.

—— Profit costs—Power to charge—Solicitor-executor—Insolvent estate - 217
See Solicitor. 3.

—— Public Authorities Protection Act—Judgment for defendant with costs—Costs as between solicitor and client - 145
See Practice. 3.

COSTS—*continued.*

—— Taxation—Charges and expenses of Liverpool solicitors' attendances in London *See* Practice. 2. 443

—— Testamentary expenses—Costs of unsuccessfully opposing probate - 225 *See* Probate.

—— Unnecessarily incurred—Stay of proceedings — Affidavits filed by defendant during stay - - - - 405 *See* Company. 6.

—— Winding-up—Costs of outside litigation—Action commenced before winding-up *See* Company. 7. 684

COVENANT—By husband alone that after-acquired property of wife shall be settled *See* Husband and Wife. 220

—— Lease — Successive assignments — "Property" of bankrupt - - 182 *See* Landlord and Tenant. 2.

—— Restrictive—Continuance of loan—Redemption—Collateral advantage—Injunction *See* Mortgage. 2. 307

—— Restrictive condition—Positive covenant—Implied negative stipulation - 240 *See* Building Scheme.

—— Running with land—Covenant for quiet enjoyment — Injunction — Damages — compensation - - - 394 *See* Railway. 1.

—— Severable—Contract for hiring and service —Injunction - - - 451 *See* Restraint of Trade.

—— To settle after-acquired property—Revocation—Evidence - - - 504 *See* Settlement.

CREDITOR—Negotiable instrument—Equitable assignment of debt - - - 582 *See* Assignment of Debt.

CREDITOR-CONTRIBUTORY — Insolvent company holding shares—Set-off of debt against calls—Winding-up of company *See* Company. 8. 428

CUSTOM — *Parish Bull and Boar — Parson — Great Tithes, Charge on—Inclosure Act—Allotment of Lands in lieu of Tithes—Transfer of Liability to Custom.*

Where, under an Inclosure Act, lands have been allotted "in satisfaction and discharge of" the great tithes, the burden of keeping up a custom that the person as owner of the great tithes shall provide and keep a bull and boar for the common use of the parishioners is not, in the absence of express words in the Act to that effect, shifted to the allottees of those lands. Lanchbury *v.* Bode - - - Kekewich J. 120

DAMAGES—Covenant running with land—Covenant for quiet enjoyment—Injunction—Compensation - - - 394 *See* Railway. 1.

DE PREROGATIVA REGIS—Conditional devise to lunatic — Jurisdiction — Election — Performance of condition by committee *See* Lunacy. 1. 378

DEATH—Contract—Non-completion before death of landowner—Right of devisee to have contract completed at cost of landowner's personal estate - - - 510 *See* Building Contract.

DEATH DUTIES—Estate duty - 276, 643 *See* Revenue. 1, 2.

DEBENTURE—Charge on all present and future "property" of the company—Winding-up of company - - - 149 *See* Company. 2.

—— Interest on—Overdrawing banker's account —Subrogation - - - 663 *See* Railway. 2.

DEBENTURE-HOLDER — Priority—Winding-up —Power to charge uncalled capital 28 *See* Company. 1.

DEBT—Conditional payment—Effect of giving cheque or bill of exchange - 680 *See* Trade Debt.

—— Creditor-contributory — Insolvent company holding shares—Set-off of debt against calls—Winding-up of company - 428 *See* Company. 8.

—— Equitable assignment—Debtor and creditor —Negotiable instrument—Notice 582 *See* Assignment of Debt.

DEBTOR AND CREDITOR—Equitable assignment of debt—Notice—Negotiable instrument - - - - 582 *See* Assignment of Debt.

DEFAULT—Contract for sale of lands—Delay in completion—Interest - - 211 *See* Vendor and Purchaser. 2.

DELAY—In completion of contract for sale of lands—"Default"—Interest - 211 *See* Vendor and Purchaser. 2.

DISCRETION—Of Court—Appointment of judicial trustee—Application by beneficiary —Sole executor - - - 352 *See* Trustee. 5.

—— Receiver—Appointment—Legal estate 573 *See* Practice. 5.

DISSOLUTION—Distribution of assets - 83 *See* Scientific Society. 1.

—— Voluntary winding-up—Jurisdiction 405 *See* Company. 6.

DISTRIBUTION—Assets—Dissolution of society *See* Scientific Society. 1. 83

DISTRICT REGISTRIES—Charges and expenses of Liverpool solicitors' attendances in London—Costs—Taxation - 443 *See* Practice. 2.

DOCUMENTS—In solicitor's possession before action—Third parties—Right to production - - - - - 1 *See* Solicitor. 2.

DOMICIL — *International Law — Marriage — Matrimonial Domicil — Change of Domicil — Movable Goods—French Law — Community of Goods.*

A Frenchman and Frenchwoman married in France without any express marriage contract, so that according to French law their rights inter se

DOMICIL—*continued.*
as to property would be governed by the rule of communauté de biens. They came to England with a small amount of money, and became permanently domiciled there. The husband amassed a large fortune, and died in England, leaving his wife surviving, and having made an English will by which he disposed of all his property:—

Held, by Kekewich J., that as to movable goods the rights of the wife under the French marriage law as to communauté de biens were not affected by change of domicil, and that the widow was entitled to the share of her husband's personal estate to which she would have been entitled if they had remained domiciled in France.

Held, on appeal, that a change of domicil alters the rights of husband and wife as to unsettled movable property, and that as at the time of the husband's death the parties were domiciled in England, their rights were governed by English and not by French law, so that the whole of the husband's personal estate was effectually disposed of by his will.

Lashley v. *Hog*, (1804) 4 Pat. 581, considered and followed. *In re* De Nicols. De Nicols *v.* Curlier - - - - - **C. A. 60**

DUTY—Estate duty—Incidence—Specific sum payable out of policy moneys - 276
See Revenue. 1.

—— Estate duty—Jointure—"Without any deduction whatsoever"—Assessment of duty—Limited owner - - 643
See Revenue. 2.

ECCLESIASTICAL LAW—*Advowson—Description—"Real Estate in the County of L."—Surrounding Circumstances—Will—Intention.*

An advowson in gross, though not aptly described as a hereditament or real estate "situate" or "in" a particular county or place, may pass under a devise of "all other my real estate in the county of L." where the surrounding circumstances or the presumed intention of the testator admit of such a construction.

Crompton v. *Jarratt*, (1885) 30 Ch. D. 298, examined and distinguished.

A testator gave one of his sons the option of acquiring a family estate, "and all other my real estate in the county of L.," at a certain price, as part of his share under the will, and, in the event of his exercising such option, devised to him the said estates absolutely. The testator owned two advowsons, both situate in the county of Lincoln, and close to the estate which he had purchased at the time of buying the said estate. The son having exercised his option to take the estate at the price named by the testator, the question was now raised whether the advowsons, being in gross, passed under the words "other real estate in the county of L.":—

Held, under the circumstances, that these words were sufficient to pass the advowsons to the son. *In re* Hodgson. Taylor *v.* Hodgson **Romer J. 545**

—— Chaplain's salary—Income tax—Charitable institution - - - - - 669
See Revenue. 3.

ELECTION—Conditional devise to lunatic—Jurisdiction—Performance of condition by committee - - - 378
See Lunacy. 1.

ENDOWMENT—Industrial school—Consent of Charity Commissioners—Jurisdiction
See Charity. 1. 687

EQUITABLE ASSIGNMENT—Debt—Notice—Debtor and creditor—Negotiable instrument - - - - - 582
See Assignment of Debt.

EQUITABLE SUB-MORTGAGE — Conflicting equities—Notice—Priority - 347
See Mortgage. 1.

ESTATE DUTY—Incidence—Specific sum payable out of policy moneys - - 276
See Revenue. 1.

—— Jointure—"Without any deduction whatsoever"—Assessment of duty—Limited owner - - - - 643
See Revenue. 2.

EVIDENCE—Appeal—Judge's notes of oral evidence in Court below - - 701
See Practice. 1.

—— As to prior user—Admissibility—Petition for revocation - - - 280
See Patent. 2.

—— Revocation—Covenant to settle after-acquired property - - - 504
See Settlement.

EXECUTOR — *Retainer — Notice — Following Assets—Creditor of higher Degree—Succession Duty—Plene Administravit.*

The settled rule that an executor who pays creditors without notice of the existence of a creditor of higher degree, is not liable to account for the sums so paid at the instance of that creditor applies to the retainer by an executor of a debt due to himself.

Blake v. *Gale*, (1886) 32 Ch. D. 571, 577, distinguished.

By the exercise of a joint power of appointment, 112,000*l.*, representing real estate, was withdrawn from a settlement and paid to a son in the lifetime of his father. The son died in 1895, leaving an estate worth 3200*l.* His executrix distributed the estate among creditors of equal degree, retaining the bulk of it in satisfaction of a debt of her own. The father having died in 1896, succession duty became payable, and the trustees of the settlement claimed that the duty on the 112,000*l.* ought to be paid out of the son's estate in priority to the other creditors:—

Held, that, the executrix having distributed the assets without notice of this debt, bonâ fide and without undue haste, the estate had been fully administered; and that the trustees, though creditors of a higher degree, had no right to follow the assets retained by the executrix in discharge of her own debt. *In re* Fludyer. Wingfield *v.* Erskine - **Romer J. 562**

—— Acknowledgment by one of two executors and trustees—Arrears of interest—Mortgage - - - - 111
See Limitations, Statutes of. 2.

EXECUTOR—*continued.*

—— Breach of trust—Liability—Relief—Acting "honestly and reasonably" - 593
See Trustee. 2.

—— Judicial trustee—Appointment—Application by beneficiary—Sole executor—Discretion of Court - - - 352
See Trustee. 5.

—— Solicitor-executor—Profit costs—Power to charge—Insolvent estate - - 217
See Solicitor. 3.

EXPECTANT OR PRESUMPTIVE SHARE—Advancement clause—Impossibility of issue—Woman past child-bearing 567
See Will.

FALSA DEMONSTRATIO—Parcels—Right of way—Misdescription—Construction of lease - - - - - - 551
See Landlord and Tenant. 1.

FINANCE ACT—Estate duty—Incidence—Specific sum payable out of policy moneys - - - - - 276
See Revenue. 1.

—— Estate duty—Jointure—"Without any deduction whatsoever"—Assessment of duty—Limited owner - - 643
See Revenue. 2.

FISHERY—Inclosure Act—Waste land—Bed of river—Right of fishing—Reservation to lord of manor—Territorial rights 358
See River.

FOLLOWING ASSETS—Retainer—Notice—Creditor of higher degree—Plene administravit - - - - - 562
See Executor.

FRAUDS, STATUTES OF—Condition precedent—Specific performance—Mistake—Rescission—"Wilful default" - - 128
See Vendor and Purchaser. 3.

FRENCH LAW—Marriage—Change of domicil—International law—Movable goods—Community of goods - - 60
See Domicil.

GAS COMPANY—*Nuisance—Statute—Gasworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 15), *s.* 29—*Gasworks Clauses Act*, 1871 (34 & 35 *Vict. c.* 41), *s.* 9.

A gas company empowered by statute to purchase defined land by agreement and erect gasworks thereon, *held* not empowered to do so to the injury of neighbouring property; the case not being within the decision in *London, Brighton and South Coast Ry. Co.* v. *Truman*, (1885) 11 App. Cas. 45.

A gas company under the Gasworks Clauses Act, 1845, 1871, is expressly liable for private nuisance committed in the construction of works, as well as in the manufacture of gas. Jordeson *v.* Sutton, Southcoates and Drypool Gas Company - - - - - North J. 614

HIGHWAY—*Highway Authority—Exercise of Powers—Lowering Surface of Street—Mains and Pipes of Water Company thereunder—Powers and Duties of Highway Authority—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 98—*Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *s.* 61.

A water company in exercise of statutory powers laid down pipes under the surface of a street, and the highway authority of the district afterwards, in exercise of the power in that behalf given by s. 98 of the Metropolis Management Act, 1855, proposed to lower the surface of the street, and to do so without altering or disturbing the position of the pipes, but so as to leave only a few inches of soil over them.

In an action by the water company to restrain the highway authority from lowering the surface of the street without at the same time lowering the pipes of the company to a corresponding depth under the new surface:—

Held, that the 98th section of the Act of 1855 did not impose upon the highway authority, when exercising the power thereby given to them of altering the level of a street, any express or implied duty to exercise also at their own expense the power by the same section given of altering the position of the pipes thereunder, for the benefit of the water company, in a case where the highway authority did not require for their own purposes to interfere with such pipes.

The decision of Kekewich J. reversed.

Gas Light and Coke Co. v. *Vestry of St. Mary Abbotts*, (1885) 15 Q. B. D. 1, distinguished; *Geddis* v. *Bann Reservoir Proprietors*, (1878) 3 App. Cas. 430, distinguished and explained. Southwark and Vauxhall Water Company *v.* Wandsworth District Board of Works
C. A. 603

—— Sewer made by landowner "for his own profit"—Vesting in local authority - 515
See Local Government.

HIRING CONTRACT—Severable covenant—Injunction - - - - - 451
See Restraint of Trade.

HUSBAND AND WIFE—*Covenant by Husband alone that After-acquired Property of Wife shall be Settled—Marriage Settlement.*

A marriage settlement contained a covenant by the husband alone that all the real and personal estate above a certain value which should at any time during the coverture by any means be acquired by the wife or the husband in her right should forthwith be settled upon the trusts of the settlement. The wife was a party to and executed the deed. During the coverture she became entitled under the will of her father to certain real estate:—

Held, that the property in question was bound by the covenant. *In re* Haden. Coling *v.* Haden
Stirling J. 220

IMPROVEMENTS—"Improvement charge"—"Improvement area" - - 491
See London.

INCLOSURE ACT—Charge on great tithes—Allotment of lands in lieu of tithes—Transfer of liability to custom - 120
See Custom.

INCLOSURE ACT—*continued.*

—— Waste land—Bed of river—Right of fishing — Reservation to lord of manor — Territorial rights - - - 358
See River.

INCOME TAX—Chaplain's salary—Charitable institution - - - - 669
See Revenue. 3.

INDEMNITY—Lease—Successive assignments—Covenants—"Property" of bankrupt
See Landlord and Tenant. 2. 182

—— Solicitor—Breach of trust—New trustees—Liability of retiring trustees - 250
See Trustee. 3.

INDUSTRIAL SCHOOL—Charity Commissioners —Jurisdiction—Consent - - 687
See Charity. 1.

INFANT—Cestui que trust—Breach of trust—New trustees — Liability of retiring trustee - - - - 250
See Trustee. 3.

INJUNCTION—Continuance of loan—Redemption—Restrictive covenant—Collateral advantage - - - - 307
See Mortgage. 2.

—— Covenant running with land—Covenant for quiet enjoyment—Damages—Compensation - - - - - 394
See Railway. 1.

—— Jurisdiction—Proceedings before justices
See Jurisdiction. 331

—— Severable covenant—Contract of hiring and service - - - - 451
See Restraint of Trade.

INSOLVENCY—Creditor-contributory—Insolvent company holding shares—Set-off of debt against calls—Winding-up of company
See Company. 8. 428

—— Insolvent estate—Solicitor-executor—Power to charge - - - - 217
See Solicitor. 3.

INTEREST—Contract for sale of lands—Delay in completion—"Default" - 211
See Vendor and Purchaser. 2.

—— Debentures—Overdrawing banker's account —Subrogation - - - 663
See Railway. 2.

—— Mortgage—Arrears—Acknowledgment by one of two executors and trustees 111
See Limitations, Statute of. 2.

—— "Wilful default"—Condition precedent—Specific performance—Mistake—Rescission - - - - - 128
See Vendor and Purchaser. 3.

INTERNATIONAL LAW (PRIVATE)—Matrimonial domicil—Change of domicil—French law—Community of goods 60
See Domicil.

JOINT STOCK COMPANY—In the nature of a—Statute—Construction - - 72
See Scientific Society. 2.

JOINTURE—Estate duty—"Without any deduction whatsoever"—Assessment of duty —Limited owner - - - 643
See Revenue. 2.

JUDGE'S NOTES—Practice—Appeal — Notes of oral evidence in Court below - 701
See Practice. 1.

JUDGMENT—Against one of two joint debtors—Effect as regards the other—Pleading—Costs - - - - 295
See Practice. 4.

JUDICIAL TRUSTEE—Appointment — Application by beneficiary—Sole executor—Discretion of Court - - 352
See Trustee. 5.

—— Executor—Breach of trust — Liability — Relief—Acting "honestly and reasonably" - - - - 593
See Trustee. 2.

—— Relief of trustees from personal liability under s. 3 of the Judicial Trustees Act, 1896—Breach of trust - - 521
See Trustee. 4.

JURISDICTION—*Injunction—Proceedings before Justices—Public Health (Buildings in Streets) Act*, 1888 (51 & 52 *Vict. c.* 52), *s.* 3—*Rules of the Supreme Court*, 1883, *Order* xxv., *r.* 5.

The Court will not interfere by way of injunction or declaration of right where the Legislature has pointed out a mode of procedure before a magistrate; unless (it seems) in very special circumstances.

Lord Auckland v. *Westminster District Board of Works*, (1872) L. R. 7 Ch. 597, *Kerr* v. *Preston Corporation*, (1876) 6 Ch. D. 463, and *Stannard* v. *Vestry of St. Giles, Camberwell*, (1882) 20 Ch. D. 190, considered. Grand Junction Waterworks Company *v.* Hampton Urban District Council
Stirling J. 331

—— Conditional devise to lunatic—Election — Performance of condition by committee
See Lunacy. 1. 378

—— Industrial school—Consent of Charity Commissioners - - - - 687
See Charity. 1.

—— Umpire—Time for making award—Arbitrators "called on to act." - - 633
See Arbitration. 1.

—— Voluntary winding-up—Dissolution of company - - - - - 405
See Company. 6.

JUSTICES—Proceedings before — Jurisdiction—Injunction - - - - 331
See Jurisdiction.

LANDLORD AND TENANT — *Lease—Parcels—Right of Way—Misdescription — Falsa Demonstratio—Construction of Lease.*

In construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect.

Rooms on the second floor of Nos. 13 and 14, Old Bond Street, were demised, together with

LANDLORD AND TENANT—*continued.*
free ingress and egress for the lessee "through the staircase and passages of No. 13" to and from the demised premises; there was no staircase in No. 13 leading to the demised premises, but there was a staircase in No. 14:—

Held, on the true construction of the lease, that a right of access over the staircase in No. 14 passed to the lessee, and that the words "of No. 13" might be rejected as falsa demonstratio.

Wrotesley v. *Adams*, (1558) Plowd. 191, discussed and applied. Cowen *v.* Truefitt, Limited **Romer J. 551**

2. —— *Lease—Successive Assignments—Covenants to Pay Rent and Indemnify Assignors—Bankruptcy of First Assignee—Purchase by Lessee of Bankrupt's Right to Indemnity—Release of Bankrupt's Estate—"Property" of Bankrupt—Chose in Action—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 20, 44, 50 *sub-s.* 5, 56, 57, 168.

A lessee assigned the lease to assignee No. 1, who assigned it to assignee No. 2, each assignment containing a covenant by the assignee to pay the rent, and keep his assignor indemnified against the covenants in the lease.

Assignee No. 1 became bankrupt, assignee No. 2 died, and the lessee, who had been called upon to pay the rent, bought from the bankrupt's trustee, and took an assignment of, the bankrupt's right to indemnity, withdrawing a proof he (the lessee) had carried in, and releasing the estate of the bankrupt:—

Held, that the right of the trustee in bankruptcy of assignee No. 1 to sue the executors of assignee No. 2 upon his covenant to indemnify was "property" within the meaning of s. 168 of the Bankruptcy Act, 1883, and assignable by the trustee; and that damages in an action by the trustee against the executors would not be confined to the dividend payable to the lessee in respect of his proof against the estate of assignee No. 1, but extended to the whole amount of the obligation under the covenants to pay and indemnify entered into by such assignee;

And *held* also, upon the construction of the deed of assignment and release, that the lessee had acquired the right of the trustee to sue the executors of assignee No. 2, and that the release did not extend to all the estate of the bankrupt, but that the asset assigned to the lessee must be excluded from it.

The judgment of North J. affirmed. *In re* Perkins. Poyser *v.* Beyfus - - **C. A. 182**

LEASE—Parcels—Right of way—Misdescription —Falsa demonstratio - - 551
See Landlord and Tenant. 1.

—— Successive assignments—Covenants—"Property" of bankrupt - - 182
See Landlord and Tenant. 2.

LIABILITY—Breach of trust.
See Cases under Trustee.

LICENCE—Assignment—Registration—Title—Priority—Notice—Equitable rights 484
See Patent. 1.

LIEN—Documents in solicitor's possession before action—Third parties—Right to production - - - - 1
See Solicitor. 2.

LIMITATIONS, STATUTE OF—*Acknowledgment—Money charged on Land—Part Payment—Payment of Interest—Presumption of Payment—Devisee also Tenant for Life of Money charged—Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57), *s.* 8.

A testator, by his will dated January 11, 1845, devised his real estate and bequeathed his personal estate to trustees, upon trust for sale and to hold the proceeds of sale upon trust to pay his debts, and to hold the residue on trust to pay the income to his wife for her life, with remainder in trust for his children living at her death, or the issue of those then dead leaving issue then living. By a codicil, dated January 30, 1855, the testator revoked the devise of real estate contained in his will so far as regarded certain specified closes of land, and he devised those closes to his wife for her life, with remainder to his two sons in equal shares as tenants in common in fee. The whole of the real estate was subject to a charge of 3000*l.* created by a predecessor of the testator. In 1865 the trustees sold the greater part of the real estate (other than that specifically devised by the codicil), and out of the proceeds paid the 3000*l.*, and some of the testator's own debts. The widow died in 1895. After the sale until her death she received the income of the residue of the proceeds of sale, and also the rents of the unsold land, including those of the specifically devised land. She never gave to the trustees any acknowledgment of the liability of the specifically devised land to bear a proportionate part of the 3000*l.*, or paid to them any part of the 3000*l.* or any interest thereon:—

Held, that *In re England*, [1895] 2 Ch. 820, applied, and that, the widow being under no legal obligation to pay any part of the 3000*l.* or any interest thereon, the right of the persons interested in the real estate (other than that specifically devised) to compel contribution out of the specifically devised estate to the payment of the 3000*l.* was barred by s. 8 of the Real Property Limitation Act, 1874. *In re* Allen. Bassett *v.* Allen - - - - **North J. 499**

2. —— *Mortgage — Arrears of Interest — Acknowledgment by one of two Executors and Trustees—Real Property Limitation Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 42.

An acknowledgment by one of two executors and devisees in trust of real estate against the wishes of the other that more than six years' interest is due on a mortgage created by their testator cannot be treated as the valid act of the two in their capacity of trustees, and is not a good acknowledgment within s. 42 of the Real Property Limitation Act, 1833. Astbury *v.* Astbury - - - - **Stirling J. 111**

—— Accounts — Carrying back account — Administration action - - 142
See Trustee. 1.

LITERARY INSTITUTIONS - 72, 83
See Scientific Society. 1, 2.

LIVERPOOL —Costs — Taxation — Charges and expenses of Liverpool solicitors' attendances in London - - - 443
See Practice. 2.

LOCAL GOVERNMENT—*Sewer—Vesting in Local Authority—Sewer made by Landowner "for his*

LOCAL GOVERNMENT—*continued.*

own profit"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, *sub-s.* 1, 15, 16, 17, 144—*Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *ss.* 67, 68.

The word "profit" in s. 13, sub-s. 1, of the Public Health Act, 1875, is not to be restricted to a direct money payment. Accordingly, a sewer which is not made for ordinary drainage purposes, but to enable the land on which it is made to be occupied more profitably, or to avoid an expenditure which would otherwise have to be incurred in order that the occupation might be equally beneficial, is made for the "profit" of the owner within the meaning of the section, and does not vest in the local authority:—

So *held*, in the case of a line of pipes laid down by the owner of a field adjoining a highway from a ditch bordering the highway to a disused gravel pit in the field for the purpose of supplying water to the cattle fed in the field.

Minehead Local Board v. *Luttrell*, [1894] 2 Ch. 178, and *Ferrand* v. *Hallas Land and Building Co.*, [1893] 2 Q. B. 135, followed and applied.

Held, also, that as on the authority of *Croft* v. *Rickmansworth Highway Board*, (1888) 39 Ch. D. 272, the pit did not form part of the drainage system vested in the local authority, they had no power under s. 67 of the Highway Act, 1835, to discharge surface water from the road into the pit, and were not entitled to enter upon the field in order to keep open the existing drain, or to make any other for the same purpose. CROYSDALE *v.* SUNBURY-ON-THAMES URBAN DISTRICT COUNCIL - - - - **Stirling J. 515**

LONDON — *Streets* — "*Improvement Charge*" — "*Improvement Area*"—"*Lands all or any part of which abut*" *on a Street—London County Council (Improvements) Act*, 1897 (60 & 61 *Vict. c. ccxlii.*), *s.* 42, *sub-s.* 1 (*c*).

By the London County Council (Improvements) Act, 1897, the London County Council were empowered (inter alia) to widen Tottenham Court Road, and to place an "improvement charge" on property included within an "improvement area," which was for this purpose defined, by s. 42, sub-s. 1 (*c*), as meaning "the lands all or any of which front or abut upon the west side of Tottenham Court Road between Oxford Street and Hanway Street."

A music hall which had a frontage on Oxford Street, where the principal entrance was, had also an entrance from Tottenham Court Road to the pit and gallery, the proprietors of the hall having acquired a leasehold interest in a house in Tottenham Court Road for the purpose of making that entrance. In order to make it they removed the lower portion of a party-wall which separated the house from the hall, but they entered into a covenant to replace the wall at the end of the lease. They were owners in fee of part of the land on which the hall stood, and were leaseholders of the remainder:—

Held, that, as the whole of the property, including the entrance to the pit and gallery, was occupied for one purpose, it could not be said that only the house in Tottenham Court Road abutted on that road, and that consequently the power of the London County Council to place an improvement charge on the music hall was not

LONDON—*continued.*

limited to the house in Tottenham Court Road. THE OXFORD, LIMITED *v.* LONDON COUNTY COUNCIL - - - - **North J. 491**

LUNACY — *Jurisdiction — Conditional Devise to Lunatic—Resettlement of Lunatic's Estate—Election—Performance of Condition by Committee—Statute De Prerogativa Regis* (17 *Edw.* 2, *c.* 10)—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 108 *sub-s.* 2, 117, 120, 124,

A lunatic can accept a devise imposing an onerous condition if it be for his benefit so to do.

In considering whether or not it is for the benefit of a lunatic to comply with a condition, the Court should act for the lunatic as if he were a person of sound mind and guided by reasonable motives.

The main purpose of the Act De Prerogativa Regis is to preserve the lands and tenements of a lunatic, and the provision therein restricting alienation ought not to be construed as prohibiting the Court from giving up, on behalf of a lunatic, an interest in his real estate in order thereby to preserve or to acquire for him a larger and more beneficial interest.

The jurisdiction of the Court in Lunacy is not confined to the cases enumerated in the Lunacy Act, 1890, and the specific provisions in Part IV. of the Act are enabling and not restrictive clauses.

The object of s. 124 of the Act is to remove any possible doubt as to the jurisdiction of the Court to order subsidiary acts to be done when exercising its statutory jurisdiction.

A lunatic entitled to a base fee in estate C. had other lands of value devised to him for life with remainder to his issue in tail on condition that he should within a certain period resettle estate C. to the uses of the devised estates.

In the opinion of the Court it was for the benefit of the lunatic that the condition should be performed:—

Held, that although the statutory powers conferred by the Lunacy Act, 1890, did not in terms authorize the Court to direct the committee of the lunatic's estate to elect on behalf of the lunatic in such a case, the Court in Lunacy had under its general jurisdiction power to direct the committee to perform the condition on his behalf and to resettle estate C., and under the circumstances ought to exercise such power notwithstanding that the resettlement of estate C. would cut down the interest of the lunatic therein. *In re* CHARLES WILLIAM HYLTON, EARL OF SEFTON (A PERSON OF UNSOUND MIND) **C. A. 378**

2. —— *Lunatic Sole Trustee—Stock—Vesting Order—Transfer of Consols—Form of Order—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 136, *sub-ss.* 1, 4; *ss.* 137, 142.

A person of unsound mind not so found being sole trustee of a sum of Consols, the Judge in Lunacy, upon the application of A. B., made an order, under the Acts of 1890 and 1891, that the right to call for a transfer of, and to transfer into his own name, the Consols standing in the name of the lunatic, and to receive the dividends thereon, should vest in A. B., and that he should transfer the Consols into his own name to be held by him upon the trusts applicable thereto.

LUNACY—*continued.*

The Bank of England refused to act upon an order in this form upon the ground that, under s. 137 of the Act, some proper officer of the bank should have been appointed to make the transfer:—

Held, that the order made by the judge was right, and that the bank must act upon it, and must allow the Consols to be transferred accordingly.

In re Gregson, [1893] 3 Ch. 233, approved.

Per Chitty L.J.: The 137th section of the Lunacy Act, 1890, applies, so far as the 136th is concerned, only to sub-s. 4 thereof. *In re* C. M. G., Spinster (a Person of Unsound Mind not so found) - - - - - - **C. A. 324**

3. —— *Maintenance—Common Order—Liability of Committee of Person to Account—Form of Inquiry.*

The committee of the estate of a lunatic was authorized by an order of March, 1896, in the common form, to pay to the committee of the person 2500*l.* per annum for the lunatic's maintenance; the order also provided for the keeping up of a considerable establishment, and that the committee of the person should be at liberty to reside in the lunatic's own house and have the use of the horses, carriages, and other effects of the lunatic. As a matter of convenience to the committee of the person, the allowance was paid quarterly in advance. A quarterly payment of 625*l.* was made on October 29, 1896, and thirteen days afterwards the lunatic died. The executors of the lunatic claimed to be repaid the sum of 528*l.*, being the proportionate part of the quarter's allowance for the period subsequent to the death of the lunatic; or, in the alternative, an inquiry what was properly payable for the maintenance of the lunatic during the thirteen days, and brought an action to enforce this claim:—

Held, that, as the lunatic had not been maintained for the whole year, the executors were entitled to receive from the committee of the person such portion of the yearly allowance as had not been properly expended for the purposes of the lunatic; and an inquiry was directed what sum ought to be allowed to the committee of the person during the time the lunatic was maintained, regard being had to the order of March, 1896, with liberty to apply in chambers for any balance that might be found due to the lunatic's estate, and as to costs.

Circumstances under which committees of the person may be called upon to account considered. *In re Ponsonby*, (1842) 3 D. & War. 27, explained. Strangwayes *v.* Read - - **Romer J. 419**

4. —— *Person of Unsound Mind not so found—Person "lawfully detained"—Order appointing Receiver—Expiry of Period of Detention—Effect of—Lunacy Act*, 1890 (53 & 54 *Vict.* c. 5), s. 116, *sub-s.* 1 (*c*).

An order made by a Master in Lunacy under s. 116, sub-s. 1 (*c*), appointing a receiver and manager of the property of a person of unsound mind not so found, who at the date of the order was "lawfully detained" under a reception order, does not necessarily come to an end when the reception order expires and the person to whom it refers ceases to be lawfully detained; but a further order of the Court is required to discharge it, and the Court will not make such order unless satisfied that the person in question is no longer subject to the delusions which may have led to the detention. *In re* B. A. S. (A Person of Unsound Mind not so found) **C. A. 392**

MAINTENANCE — Liability of committee of person to account—Form of inquiry 419
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MARRIAGE SETTLEMENT — Covenant by husband alone that after-acquired property of wife shall be settled - 220
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MARRIED WOMAN — Covenant by husband alone that after-acquired property of wife shall be settled - - 220
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METROPOLIS MANAGEMENT ACTS—Lowering surface of street—Pipes of water company thereunder—Duties of highway authority - - - - 603
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MIDDLESEX REGISTRY — "Conveyance" — Title of official receiver under Bankruptcy Act, 1883 - - - 460
See Bankruptcy. 2.

MINE — *Minerals—Chattels—Mounds of Refuse produced in Iron Manufacture.*

Plaintiffs demised coal and iron mines to a company, which, in manufacturing iron from ironstone, produced large quantities of refuse (consisting principally of protoxide of iron and silica) called "tap-cinder" or "puddlers' taps." This refuse, which was at the time unsaleable, was thrown on the demised land and accumulated in large mounds. On the determination of the lease plaintiffs demised the land and minerals to defendants, who only worked the coal, and did not add to the mounds. Afterwards defendants purchased the "stores and other effects" on the land from plaintiffs. The tap-cinder in the meantime had acquired a commercial value, and large quantities of it were sold by defendants:—

Held, that plaintiffs were entitled to the mounds and to an account of the proceeds of sale, inasmuch as the mounds, although they might have been removed by the company during its lease, were not chattels passing under the sale of the stores and effects, and were not iron, or ironstone mines, seams, veins, or beds, opened or unopened, or minerals within the meaning of the defendants' lease. Boileau *v.* Heath **Bigham J. 301**

MISDESCRIPTION — Parcels — Right of way—Falsa demonstratio — Construction of lease - - - - - - 551
See Landlord and Tenant. 1.

MISTAKE — Specific performance — Condition precedent — Rescission — "Wilful default" - - - - 128
See Vendor and Purchaser. 3.

MORTGAGE—*Priority—Real Estate—Sub-mortgagees—Equitable Estates—Conflicting Equities—Notice—Priority.*

An equitable sub-mortgagee by deposit made by a legal mortgagee of land has an equitable estate in land, and therefore, as between two such equitable sub-mortgagees, the doctrine of obtaining priority by notice does not prevail. Thus the equitable sub-mortgagee who is later in time does not obtain priority over the earlier by being the first to give notice to the original mortgagor.

In re Richards, (1890) 45 Ch. D. 589, considered. Hopkins *v.* Hemsworth.
Kekewich J. 347

2. —— *Redemption—Mortgagor and Mortgagee—Continuance of Loan—Restrictive Covenant—Collateral Advantage—Injunction.*

A mortgagee may stipulate for a collateral advantage at the time and as a term of the advance, provided the equity of redemption is not thereby fettered, and the bargain is a fair and reasonable one, entered into between the parties while on equal terms, without any improper pressure, unfair dealing, or undue influence.

Jennings v. *Ward*, (1705) 2 Vern. 520, explained and distinguished.

Mainland v. *Upjohn*, (1889) 41 Ch. D. 126, discussed and applied.

A mortgage of an hotel to a brewer contained a covenant by the mortgagors that during the continuance of the security they would deal exclusively with the mortgagee for all beer and malt liquor sold on the mortgaged premises. The deed also contained the usual provisoes for the continuance of the loan for five years. The mortgagors having ceased to purchase beer of the mortgagee, he now moved for an injunction to restrain the breach of this covenant; the mortgagors also claimed to be entitled to redeem before the expiration of the five years:—

Held, by Romer J., that the provisoes for the continuance of the loan were valid, and that the mortgagors were not entitled at present to redeem. This decision was not appealed from.

Held, further, by Romer J. and by the Court of Appeal, that as the covenant entered into by the parties for the purchase and supply of beer during the continuance of the security was a reasonable one, which did not in any way clog the redemption or give the mortgagee any undue advantage, it ought to be enforced by injunction. Biggs *v.* Hoddinott. Hoddinott *v.* Biggs
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—— Absence of power to mortgage—Improvements—Repairs. - - - 534
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—— Arrears of interest—Acknowledgment by one of two executors and trustees 111
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—— Debentures—Charge on all present and future property of the company - 149
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—— Mortgagee vendor—Statutory power of sale—Defective exercise—Title. - 230
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—— Licence — Assignment — Registration — Priority—Equitable rights - 484
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—— Priority — Sub-mortgagees — Conflicting equities - - - - 347
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—— Retainer — Following assets — Creditor of higher degree—Plene administravit
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OFFICIAL REFEREE—Title under Bankruptcy Act, 1883—"Conveyance"—Registration in Middlesex - - - 460
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OPTION—Sale by tenant for life—Trustees for purposes of Act—Payment of money into court. - - - - 660
See Settled Land. 2.

ORAL EVIDENCE—Judge's notes in Court below—Practice—Appeal - - 701
See Practice. 1.

PARCELS — Right of way — Misdescription — Falsa demonstratio — Construction of lease - - - - - 551
See Landlord and Tenant. 1.

PATENT—*Licence—Agreement for Sale—Assignment—Registration—Title—Priority—Notice—Equitable Rights—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 23, 87.

By an agreement in writing W., the registered proprietor of a patent, agreed for value to assign it to the plaintiffs. Before that agreement had been registered W. granted a licence to use the patent to S., who forthwith registered the licence. S., before he took his licence, was informed by W. of the agreement with the plaintiffs, which W. stated to be no longer in force. Subsequently the plaintiffs registered their agreement and took an assignment, which they duly registered:—

Held, affirming the decision of Kekewich J., [1898] 2 Ch. 137, that under the proviso in s. 87 of the Patents, Designs, and Trade Marks Act, 1883, S., having had before he took his licence express notice of the plaintiffs' agreement, could not assert against them his legal title by prior registration, and that the licence was void as

PATENT—*continued.*

against the plaintiffs. New Ixion Tyre and Cycle Company *v.* Spilsbury. - **C. A. 484**

2. —— *Revocation—Petition for—Evidence as to prior User—Admissibility of Evidence.*

An action for infringement of the patent the subject of this petition, brought by the respondent to the present petition, having failed, the Court being satisfied that the invention had been used prior to the date of the patent at one place out of several referred to, this petition was brought to have the patent declared void, the petitioner relying solely on the instance which had satisfied the Court in the prior action.

A witness on the part of the petitioner stated that he had seen the invention used at the particular place relied on, and in cross-examination he stated that he had seen it used also at other places referred to prior to the date of the patent.

The respondent asked to be allowed to adduce evidence as to the prior user at such other places:—

Held, that the evidence was inadmissible on the ground that if admitted it would be allowing the respondent to go into matters not relevant to the question at issue for the sole purpose of discrediting the witness and disproving the answers to questions put to him on cross-examination. *In re* Haggenmacher's Patents **Romer J. 280**

PAYMENT INTO COURT—Sale by tenant for life—Trustees for purposes of Act—"Option" - - - - - **660**
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PETITION—Revocation—Evidence as to prior user—Admissibility - - **280**
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PLENE ADMINISTRAVIT—Retainer—Notice—Following assets—Creditor of higher degree - - - - - **562**
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POLICY—Estate duty—Incidence—Specific sum payable out of policy moneys - **276**
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POLITICAL PURPOSES—Gift for religious and
See Charity. 3. **638**

POWER—*Mortgage—Absence of Power to Mortgage—Will—Real Estate—Trust for Sale—Postponement of Sale—Improvements—Repairs.*

A testator gave his real and residuary personal estate to trustees in trust for sale, with a power of postponement in the usual form, followed by a power (also in common form) during such postponement to manage and let the real estate and to make out of the income or capital of his real and personal estate any outlay they might consider necessary for renewals of leases, improvements, repairs, premiums on policies or otherwise for the benefit or in respect of his real or personal estate. The will contained no express power to raise money by mortgage or charge:—

Held, that the trustees had power to raise money by mortgage or charge of the real estate for the purpose of repairing houses forming part of the real estate. *In re* Bellinger. Durell *v.* Bellinger - - - **Kekewich J. 534**

POWER OF SALE—Statutory—Defective exercise—Mortgagee vendor—Title - **230**
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PRACTICE—*Appeal—Judge's Notes of Oral Evidence in Court below.*

The Master of the Rolls at the sitting of the Court of Appeal on November 4, 1898, said that a misapprehension had arisen with reference to certain remarks made by his Lordship during the hearing of this case, noted W. N. (1898) 77 (8), and reported [1898] 2 Ch. 442. The first paragraph there given, namely, "It is desirable that solicitors should know that, on an appeal in cases where evidence has been taken orally in the Court below, it is their duty to apply in good time for the judge's notes of evidence," was correct; but the concluding words should read as follows: "If they do so, this Court will apply to the judge for a copy of his notes; but if, as frequently happens, a copy of the notes is applied for just before the appeal comes on for hearing, there is no time to obtain a copy for the use of the Court of Appeal, which leads to great inconvenience."

See the Annual Practice for 1898, p. 1045, and the Annual Practice for 1899, p. 847; Order lviii., r. 11, and the notes thereto. *In re* Batt & Co.'s Registered Trade-marks. *In re* Carter's Application - - - - **C. A. 701**
See also Trade-mark.

2. —— *Costs—District Registries—Liverpool District Registry—Taxation—Affidavit—Evidence—Charges and Expenses of Liverpool Solicitors' Attendances in London—Rules of the Supreme Court*, 1883, *Order* lxv., *r.* 27, *sub-r.* 43.

The taxation of party and party costs in the Liverpool and Manchester District Registries proceeds on the same principles as obtain in the London Taxing Masters' Offices, where the costs in other district registries are taxed.

There is no hard and fast rule that in no case, where proceedings have been initiated in a district registry and are heard in London on affidavit evidence only, will the costs of the country solicitor's attendance at the hearing in London be allowed.

Such costs may be allowed in very exceptional cases, where no London agent has been employed, e.g., where charges of fraud or personal misconduct have been made and have failed.

Decision of Byrne J. affirmed. *In re* Dixon. Tousey *v.* Sheffield - - - **C. A. 443**

3. —— *Costs—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1, *sub-s.* (*b*)—*Judgment for Defendant with Costs—Taxation—Costs as between Solicitor and Client.*

Where a defendant, a public authority, in an action falling within the Public Authorities Protection Act, 1893, succeeds, so that substantially the defendant obtains judgment, the defendant is entitled under the Act to costs to be taxed as between solicitor and client, notwithstanding that the judgment as drawn up merely directs the plaintiff to pay the defendant's costs without directing how such costs are to be taxed. The omission of such a direction will not deprive the defendant of the benefit of the statute, the Court having no discretion in the matter when once it is clear that in substance judgment has been

PRACTICE—*continued.*

obtained by the defendant. It is not necessary that the judgment itself should shew on its face that the action was one falling within the Act.

Finlay v. *Seaton*, (1808) 1 Taunt. 210, *Forman* v. *Dawes*, (1843) 11 M. & W. 730, and *Lister* v. *Leather*, (1858) 4 K. & J. 425, discussed. North Metropolitan Tramways Company *v.* London County Council - - - **Romer J. 145**

4. —— *Judgment against One of Two Joint Debtors—Effect as regards the Other—Pleading—Costs.*

The rule in *King* v. *Hoare*, (1844) 13 M. & W. 494, that a judgment against one of two joint debtors is a bar to proceedings against the other, applies where both joint debtors are originally made defendants to and enter appearance in the same action, and judgment by consent has been obtained against one of them in that action.

The observations of Bowen L.J. in *In re Hodgson*, (1885) 31 Ch. D. 177, 188, followed.

Where one joint debtor has consented to judgment, the other, if he wishes to avail himself of the judgment as a defence, should plead it. A debtor not so pleading was ordered to pay costs up to the time of the consent judgment. McLeod *v.* Power - - - - **Byrne J. 295**

5. —— *Receiver—Appointment—Discretion—Legal Estate—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

The Court has now a discretionary power to appoint a receiver whenever it appears to the Court to be just and convenient, and this power may be exercised where the plaintiff is seeking to recover land by a legal title. The discretion must be exercised with a view to all the circumstances of the case. Among other things, it is important to bear in mind the position of the tenants, who, if the defendant is not a person of undoubted solvency and remains in receipt of the rents, may be called upon to pay twice over if the plaintiff succeeds. The Court has also to consider the probability of the plaintiff's succeeding, and the length of the defendant's possession, and whether he has any primâ facie title; and the Legislature must be taken to have contemplated the result that an application for a receiver may practically compel the defendant in an action of ejectment to disclose his title.

Where therefore the plaintiff sought to recover land by a legal title, and the title of the defendant, who was a person of small means, appeared to be shadowy, and the plaintiff's title appeared to be satisfactorily made out, subject to a point on the construction of a will which the Court considered very unlikely to be decided against him:—

Held, by North J. and the Court of Appeal, that a receiver ought to be appointed.

Foxwell v. *Van Grutten*, [1897] 1 Ch. 64, considered. John *v.* John - - **C. A. 573**

PRIORITY—Debenture-holders—Winding-up—Power to charge uncalled capital 28
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—— Notice — Sub-mortgagees — Conflicting equities - - - - 347
See Mortgage. 1.

PROBATE—*Costs—Testamentary Expenses—Costs of unsuccessfully opposing Probate.*

The plaintiff's costs of an unsuccessful action impeaching the validity of a will, though ordered by the judge of the Probate Division to be paid out of the testator's estate, are not testamentary expenses. *In re* Prince. Godwin *v.* Prince **Stirling J. 225**

PRODUCTION OF DOCUMENTS—Documents in solicitor's possession before action—Third parties—Right to production 1
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PROFIT—Secret profit by promoters—Duty of disclosure - - - - 153
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PROMOTER—Secret profit by promoters—Duty of disclosure - - - 153
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PROOF—Practice—Bills of exchange—Secured creditor—Lumping debts and securities—Rights of trustee - - 413
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PUBLIC AUTHORITIES PROTECTION ACT—Judgment for defendant with costs—Costs as between solicitor and client
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PUBLIC HEALTH—Buildings in streets—Jurisdiction—Injunction—Proceedings before justices - - - - 331
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QUIET ENJOYMENT—Covenant running with land—Injunction—Damages—Compensation - - - - 394
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RAILWAY—*Compensation—Purchase by Railway Company of Reversion on Lease—Covenant running with Land—Covenant for Quiet Enjoyment—Injunction—Damages—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 6.

In 1893 an Act was passed enabling the plaintiff company to take compulsorily (inter alia) the property to which this action related. In 1894 the owner of the property let it to the defendant for a term of years by a lease containing the usual covenant for quiet enjoyment. In 1895 the company purchased the reversion of the property, subject to the lease. After this the company proceeded with their works, and in so doing caused structural injury to the defendant's house; they also for some time rendered the access to his premises less convenient, by erecting

RAILWAY—*continued.*
hoardings which blocked up half the thoroughfare along the street in which his house stood, and by taking a great number of carts along that street. They also for three or four days incumbered a passage along which he had a right of way so that he could not use it. It was not alleged that the company had exceeded their statutory powers or exercised them negligently. The company sued the defendant for rent, and he counter-claimed for damages for breach of the covenant for quiet enjoyment:—

Held, that the covenant for quiet enjoyment was in force and was binding on the company, and that they were liable to make compensation for any breach of it, but that no action would lie against them for any breach of it committed in the reasonable and careful exercise of their statutory powers, the only remedy of the tenant for such breaches being under the compensation clauses of the Railways Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation Act, 1845, and that the counter-claim, therefore, had been properly dismissed.

Though structural injury to a house by the lessor is a breach of the covenant for quiet enjoyment, no temporary inconvenience caused by the lessor, but not affecting the title or possession of the tenant, is a breach of the covenant.

Decision of Byrne J. affirmed. MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY *v.* ANDERSON - - - - - C. A. 394

2. —— *Debentures—Interest on—Overdrawing Banker's Account—Subrogation.*

A railway company having power to create and issue debentures were permitted by their bankers to overdraw their account to a large amount for the purpose of paying the interest on the debentures. In 1897 judgment was obtained against the railway company, and a receiver was subsequently appointed. The bank had no knowledge when allowing the overdraft that proceedings were pending against the company. The bank claimed to be entitled to be subrogated to the rights of the debenture-holders in respect of the overdraft, and that the same should be paid by the receiver in priority to any payment to the debenture-holders:—

Held, that the bank was not entitled as against the debenture-holders to have any part of its claim paid out of moneys in the receiver's hands before payment thereout of interest due and payable to the debenture-holders. *In re* WREXHAM, MOLD AND CONNAH'S QUAY RAILWAY COMPANY - - - - - Romer J. 663

REAL PROPERTY LIMITATION—Acknowledgment—Payment of interest—Presumption of payment—Devisee also tenant for life of money charged - 499
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—— Mortgage—Arrears of interest—Acknowledgment by one of two executors and trustees - - - - - 111
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REDEMPTION—Continuance of loan—Restrictive covenant—Collateral advantage—Injunction - - - - 307
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RENT—Way-leave over and—Right of reversioner - - - - 674
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RENTS—Anticipation of—Churchwardens—Income of charity estates—Banking account—Charge on charitable property 44
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REPAIRS—Real estate—Trust for sale—Postponement of sale—Absence of power to mortgage - - - - 534
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RESCISSION—Condition precedent—Specific performance—Mistake—"Wilful default" - - - - 128
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—— Power of—Conditions of sale—Effect of commencing litigation—Costs - 285
See VENDOR AND PURCHASER. 1.

RESTRAINT OF TRADE—*Severable Covenant—Contract of Hiring and Service—Injunction.*

By an agreement in writing H. agreed to serve the William Robinson Company as confidential clerk for five years from January 1, 1895, the company having the option to renew the engagement for five years more. The company could dismiss H. at any time by three months' notice. H. agreed that during the term he would devote his whole time and attention to the business of the company, and that he would not during the engagement, without the consent of the company, engage as principal or servant in any business relating to goods of any description made or sold by the company, or in any other business whatever, upon pain of instant dismissal. H. covenanted that if he should be so dismissed he would not at any time within three years from his dismissal be engaged directly or indirectly as principal, agent, or servant in the business of dealer in wares of the description

RESTRAINT OF TRADE—*continued.*
made by the company, within 150 miles of W. In 1898 H. left the service of the company without leave, and became traveller to another firm carrying on the same business. The company applied for an injunction to restrain H. during the term of service from carrying on as principal, agent, servant, or otherwise, any business relating to goods of the description made by the company, and from soliciting orders for other firms.

North J. refused an injunction on the authority of *Ehrman* v. *Bartholomew*, [1898] 1 Ch. 671:—

Held, on appeal, that, during the continuance of the engagement, the agreement made by H. with the company that he would not engage in any business relating to goods sold by the company, was valid though not restricted in point of space, and that it was severable from the agreement not to engage in any other business, and ought to be enforced by injunction. An injunction was therefore granted as asked, but limited to the first term of five years, the company waiving their option to retain H. in their service for another five years, and the Court doubting whether the agreement ought to be enforced for that further term. William Robinson & Co. *v.* Heuer - - - - - **C. A. 451**

RESTRICTIVE COVENANT—Continuance of loan—Redemption—Collateral advantage—Injunction - - - **307**
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RETAINER—Notice—Following assets—Creditor of higher degree—Plene administravit - - - - - **562**
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REVENUE—*Estate Duty—Incidence—Specific Sum payable out of Policy Moneys—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 14, *sub-s.* 1.

Sect. 14, sub-s. 1, of the Finance Act, 1894, has no reference to the incidence of the estate duty, but is intended for the protection of the executor or other person who is called upon to pay the duty, by giving him a right to recoupment.

The holder of a policy of assurance on his own life for 5000*l.* by his marriage settlement assigned the policy to trustees upon trust to raise at his death 4000*l.* to be held on certain trusts, and as to the remaining part of the policy moneys in trust to pay the same to his executors:—

Held, that s. 14, sub-s. 1, of the Finance Act, 1894, was not applicable, and that the estate duty on the fund must be borne by the part remaining after payment of the 4000*l.* Wade *v.* Wade - - - - **Kekewich J. 276**

2. —— *Estate Duty—Jointure—"Without any deduction whatsoever"—Settlement—Assessment of Duty—Limited Owner—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*); *s.* 4; *s.* 7, *sub-s.* 7; *s.* 8, *sub-s.* 4; *s.* 9, *sub-ss.* 1, 5, 6, 7; *s.* 14, *sub-s.* 1.

Under a settlement made by a father and son on the marriage of the latter, an estate was limited to certain uses in strict settlement, including a limitation of a jointure of 1000*l.* a year to the wife, A., in case she survived both father and son, which event happened, such jointure to be paid to her "without any deduction whatsoever except in respect of income tax." The father, by a subsequent settlement made on his second marriage, appointed, under a power in the former settlement, a jointure of 500*l.* a year to his wife, B., if she survived him, which event happened, and charged the same upon the settled estate, but there were no words of exemption as in the case of the 1000*l.* jointure.

Upon the father's death both jointures became payable.

Held, as to A.'s jointure, that she was not herself liable to pay the estate duty upon it, or any interest on such duty, since the words "without any deduction, &c.," constituted a contract of exemption and also amounted to an "express provision to the contrary" within s. 14, sub-s. 1, of the Finance Act, 1894:

Held, as to B.'s jointure, that she must be treated as tenant for life of a sum equivalent to the capitalized value of the jointure, to be ascertained at the same number of years' purchase as the estate as a whole was capitalized for the purpose of duty; and that she must be charged with estate duty on that sum, but was entitled to throw the duty charged against her upon the corpus of the estate, on the terms of her paying interest to the tenant for life or in tail or in fee in possession at the rate actually paid to the Commissioners of Inland Revenue until payment of the duty, and thereafter at the rate at which the duty could be raised by mortgage of the estate.

Under the Finance Act, 1894, the estate duty on the estate passing on a death is chargeable on the estate as a whole, without regard to tenancies for life or other particular interests, the scheme of the Act being that the duty shall be levied on the inheritance and that the inheritance shall bear it. *In re* Parker-Jervis. Salt *v.* Locker **Kekewich J. 643**

3. —— *Income Tax—Chaplain's Salary—To be paid "without any Deduction or Abatement for Taxes"—Charitable Institution—Special Act* (10 *Geo.* 4, *c. xv.*), *ss.* 22, 26—*Income Tax Act,* 1842 (5 *&* 6 *Vict. c.* 35), *s.* 102, *and Sched. E, rr.* 1, 3, 6.

The Special Act passed in 1829 incorporating a charitable institution provided that the salary of the chaplain should not be less than 300*l.* nor more than 500*l.* per annum, and that the wardens should pay it to him "without any deduction or abatement for taxes or otherwise howsoever":—

Held, that the wardens were nevertheless bound under the provisions of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), to deduct income tax from the chaplain's salary. *In re* The School for the Indigent Blind at Liverpool **Byrne J. 669**

REVERSIONER—Right of—Rent—Way-leave over land - - - - **674**
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REVOCATION—Covenant to settle after-acquired property—Evidence - - **504**
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REVOCATION—*continued.*
—— Petition for—Evidence as to prior user—Admissibility - - - - 280
See PATENT. 2.

RIGHT OF WAY—Parcels—Misdescription—Falsa demonstratio—Construction of lease - - - - - - 551
See LANDLORD AND TENANT. 1.

RIVER—*Waste Land—Bed of River—Right of Fishing—Reservation to Lord of Manor—Territorial Rights—Inclosure Act*, 1796 (36 *Geo.* 3, *c. xxxix.*).

By a private Inclosure Act, passed in 1796, an allotment was directed of certain waste lands in a manor, the mines, &c., being reserved to the lord, and the allotments were declared freehold of the allottees to all intents and purposes. There was a saving clause providing that nothing in the Act should affect the title of the lord to the mines or to the seignories and royalties, franchises and liberties incident to the manors, but that the lord, his heirs and assigns, should enjoy (inter alia) all piscaries, fishing, &c., which could or might be claimed by him or them as owner or owners of the soil of the moors, commons, and waste grounds, in as full, ample, and beneficial a manner to all intents and purposes as if the Act had not been passed. The waste lands were bounded on one side by the River E., and the soil of half the bed belonged to the lord. There was no evidence that any of the tenants had ever enjoyed any rights of fishing, or any other commonable rights, over any part of the bed of the river; but there was evidence that at the time of the passing of the Act the lord exercised and let to tenants the right of fishing over the half bed. The commissioners allotted to Leach a part of the waste called Edenbanks, described as bounded on the west by the river, and gave an acreage which was correct for the land if the half bed was not included. In 1890 the successor of the lord granted to the plaintiff the right of fishing in half the river between two points lying above and below Edenbanks. The plaintiff brought his action to establish his right of fishing in front of Edenbanks, and a right of landing on Edenbanks for fishing purposes. The Leach family insisted that the allotment to Leach passed the soil of the bed ad medium filum, and that they had the exclusive right of fishing over so much as adjoined Edenbanks, and by counter-claim asked an injunction to restrain the plaintiff from fishing opposite Edenbanks, and from landing on Edenbanks for fishing purposes:—

Held, that as the half bed of the river had been enjoyed and let by the lord as a separate tenement up to the passing of the Act, and the commoners had never exercised any rights of common over it, it did not form part of the waste lands which the commissioners were authorized to allot, and that even if they had expressly included half the bed in the allotment to Leach, he would have taken no interest in the bed, and that he had no right of fishing.

Held that, according to *Duke of Devonshire* v. *O'Connor*, (1890) 24 Q. B. D. 468, the saving clause in the Act did not reserve to the lord any merely territorial rights; and that as it did not appear that he had any franchise of fishing, his right to land upon Edenbanks for fishing purposes was a merely territorial right incident to his ownership of the soil, and was extinguished by the allotment.

Decision of North J., [1897] 2 Ch. 554, affirmed. ECROYD *v.* COULTHARD - **C. A. 358**

RULES OF SUPREME COURT, Order XXV., r. 5—*Proceedings in lieu of Demurrer* 331
See JURISDICTION.
—— **Order LXV., r. 27, sub-r. 43**—*Costs* - 443
See PRACTICE. 2.

SALARY—Chaplain's—Income tax—Charitable institution - - - - - 669
See REVENUE. 3.

SALE—By tenant for life—Trustees for purposes of Act—Payment of money into court—"Option" - - - - 660
See SETTLED LAND. 2.
—— Of assets—Amalgamation—Distribution of consideration - - - 469
See COMPANY. 4.
—— Statutory power of—Defective exercise—Mortgagee vendor—Title - - 230
See VENDOR AND PURCHASER. 4.

SCIENTIFIC SOCIETY—*Dissolution—Distribution of Assets—Literary and Scientific Institutions Act*, 1854 (17 & 18 *Vict. c.* 112), *ss.* 30, 33.

A society falling within the general scope of the Literary and Scientific Institutions Act, 1854, may be an institution in the nature of a joint stock company within the exception in s. 30, although not formed for purposes of profit, if it has the other usual indicia of a joint stock company—as, for example, if it has common property derived from the contributions of its members, and held by them in transferable shares.

In re The Bristol Athenæum, (1889) 43 Ch. D. 236, considered.

A horticultural society was constituted in 1844 under a deed which provided that any person who paid a certain fixed sum to the funds of the society should be a member and entitled to one share in the society, which was to be transferable by him or his legal personal representatives, and that each member should pay a fixed annual subscription, and should be entitled to admission for himself and family to the gardens of the society, but should not be entitled to any dividend or bonus, nor to any interest in the property of the society except the right to participate in the profits on a dissolution:—

Held, that the society came within the exception in s. 30 of the Literary and Scientific Institutions Act, 1854, and that upon dissolution the property of the society became distributable among the members. *In re* JONES. CLEGG *v.* ELLISON - - - **Stirling J. 83**

2. —— "*In the Nature of a Joint Stock Company*"—*Statute—Construction—Literary and Scientific Institutions Act*, 1854 (17 & 18 *Vict. c.* 112), *s.* 30.

A literary and scientific institution, in the property of which proprietors were interested in proportion to the number of their shares, which shares were transferable and transmissible:—

Held, to be in the nature of a joint stock com-

SCIENTIFIC SOCIETY—*continued.*
pany within the meaning of the Literary and Scientific Institutions Act, 1854, s. 30.
In re The Bristol Athenæum, (1889) 43 Ch. D. 236, discussed. *In re* RUSSELL INSTITUTION. FIGGINS *v.* BAGHINO - - - **North J. 72**

SECURED CREDITOR—Proof—Practice—Bills of exchange—Lumping debts and securities—Rights of trustee - - **413**
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SERVANT—Contract of hiring—Severable covenant—Injunction - - - **451**
See RESTRAINT OF TRADE.

SET-OFF—Creditor-contributory—Insolvent company holding shares—Set-off of debt against calls—Winding-up of company
See COMPANY. 8. **428**

SETTLED LAND—*Application of Capital Money—"Liable" to be laid out in the Purchase of Land—Statute—Construction—Settled Land Act,* 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 32, 33.
Personal property held by trustees with power to invest in land is liable to be laid out in the purchase of land within the meaning of ss. 32 and 33 of the Settled Land Act, 1882. *In re* SOLTAU'S TRUSTS - - - **North J. 629**

2. —— *Tenant for Life—Sale by—Trustees for the Purposes of the Act—Payment of Money into Court—"Option"—Vendor and Purchaser—Settled Land Act,* 1882 (45 *&* 46 *Vict. c.* 38), *s.* 22.
Sect. 22 of the Settled Land Act, 1882, which confers on a tenant for life the option of capital money arising under the Act being paid either to the trustees of the settlement or into court, presupposes that there are trustees for the purposes of the Act in existence.
Therefore, where a vendor selling as tenant for life enters into a contract for the sale of settled land, he cannot, under s. 22, require the purchaser to pay the purchase-money into court where no trustees for the purposes of the Act are in existence when the time comes for the completion of the contract, and the contract will not be enforced.
Where, however, a purchaser pays his purchase-money into court in ignorance of the fact that there are no trustees in existence, he will get a good title. *In re* FISHER AND GRAZEBROOK'S CONTRACT - - - - **Romer J. 660**

3. —— *Trustees—Sale by Tenant for Life—Instrument affecting Interests created by Original Settlement—Appointment of Trustees of Compound Settlement—Settled Land Act,* 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 2, 3, 20, 22, 38, 45, 50—*Settled Land Act,* 1890 (53 *&* 54 *Vict. c.* 69), *s.* 4.
As a general rule it is not necessary, whenever a deed has been executed affecting the interests created by an original settlement, so that that settlement is no longer the only instrument "under or by virtue of which the land stands limited for the time being to or in trust for persons by way of succession," to appoint trustees of a compound settlement constituted by the original settlement and the subsequent deed. Sect. 4 of the Settled Land Act, 1890, is not to be read as providing that an assignment made by a tenant for life of settled land, in consideration of marriage or by way of family arrangement, is to be deemed one of the instruments creating the settlement for all the purposes of the Act. It is limited to the purpose of excluding the operation of s. 50 of the Settled Land Act, 1882, altogether. Upon a sale, therefore, under the powers of the Settled Land Acts, by a tenant for life who has made such an assignment, it is not necessary to appoint trustees of the settlement constituted by the original deed and the instrument effecting the assignment; but the trustees of the original settlement, having powers of sale, or appointed for the purposes of the Settled Land Acts, are competent to receive and give receipts for the purchase-money.
In re Tibbits' Settled Estates, [1897] 2 Ch. 149; *In re Meade's Settled Estates,* [1897] 1 Ir. 121; and *In re Marquis of Ailesbury and Lord Iveagh,* [1893] 2 Ch. 345, distinguished. *In re* DU CANE AND NETTLEFOLD'S CONTRACT
Stirling J. 96

SETTLEMENT—*Covenant to settle after-acquired Property—Evidence—Revocation.*
Two ante-nuptial settlements were executed, each contained a covenant to settle after-acquired property of the intended wife, but upon different trusts. In the absence of evidence of reasons for making the second settlement, the Court, without deciding whether the first settlement in point of time could have been superseded as to after-acquired property, refused to hold that the first settlement was superseded by the second. *In re* GUNDRY. MILLS *v.* MILLS - **North J. 504**

—— Covenant by husband alone that after-acquired property of wife shall be settled - - - - **220**
See HUSBAND AND WIFE.

—— Estate duty—Jointure—"Without any deduction whatsoever"—Assessment of duty—Limited owner - - **643**
See REVENUE. 2.

—— Sale by tenant for life—Appointment of trustees of compound settlement - **96**
See SETTLED LAND. 3.

SEWER—Vesting in local authority — Sewer made by landowner "for his own profit"
See LOCAL GOVERNMENT. **515**

SHAREHOLDERS—Meeting of—Closure - **469**
See COMPANY. 4.

SHARES—Issue of fully paid-up shares—Registered contract — Consideration — Sufficiency - - - - **556**
See COMPANY. 5.

SOLICITOR—*Costs—Mortgage—Negotiating Loan—Scale Fee—Conveyancing—Solicitors' Remuneration Act,* 1881 (44 *&* 45 *Vict. c.* 44)—*General Order under Act, Sched. I.*
The scale fee to "mortgagee's solicitor for negotiating loan" provided for by Shed. I. to the General Order under the Solicitors' Remuneration Act, 1881, is applicable to all cases of loans on mortgage, and is not confined to loans upon mortgage of freehold, copyhold, or leasehold property exclusively. *In re* FURBER
Kekewich J. 538

2. —— *Lien—Administration Action—Docu-*

SOLICITOR—*continued.*

ments in Solicitor's Possession before Action—Third Parties—Right to Production.

A solicitor having a lien on documents in his possession belonging to his client, party to an action, may not embarrass proceedings taken in the action by a third party by refusing to produce the documents if wanted by that third party for the purpose of his proceedings, even though the documents may have come into the solicitor's possession before the commencement of the action.

At the time of the death of a testator his solicitor, C., had in his possession certain documents belonging to the deceased and on which he, C., had the ordinary solicitor's lien. Subsequently the executors of the deceased employed C. to institute an action for the administration of the estate, and the usual administration judgment was pronounced. The action after judgment not being prosecuted with due diligence, conduct of the proceedings was, by order, given to a creditor, the estate being insolvent. The executors however remained parties and C. continued to act for them :—

Held, by the Court of Appeal (affirming Kekewich J.) that, notwithstanding his lien, C. was bound to produce to the creditor the documents in his, C.'s, possession, to enable the creditor to take steps for getting in a mortgage debt due to the estate.

The principles and extent of a solicitor's lien discussed. *In re* Hawkes. Ackerman *v.* Lockhart - - - - - C. A. 1

3. —— *Profit Costs—Power to Charge—Will—Solicitor-Executor—Trustee—"Legacy"—Insolvent Estate.*

A solicitor who is the sole executor and trustee of a will is not entitled to his profit costs of acting as solicitor to the estate if it turns out to be insolvent, even though the will contains a clause declaring that he should be the solicitor to the estate, and should be allowed to charge for work done as such solicitor; for the clause is in effect a legacy of profit costs to the solicitor, and being bounty he cannot claim it as against creditors.

The rule applies to all professional trustees.

The decision of Kekewich J., [1898] 1 Ch. 297, affirmed. *In re* White. Pennell *v.* Franklin - - - - C. A. 217

—— Breach of trust—New trustees—Liability of retiring trustees—Indemnity - 250
See Trustee. 3.

—— Costs as between solicitor and client—Public Authorities Protection Act 145
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—— Costs—Taxation—Charges and expenses of Liverpool solicitors' attendances in London - - - - 443
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SPECIFIC PERFORMANCE — Condition precedent — Mistake — Rescission—"Wilful default" - - - - 128
See Vendor and Purchaser. 3.

—— Mortgagee vendor—Statutory power of sale—Defective exercise - - 230
See Vendor and Purchaser. 4.

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17 Edw. 2. c. 10—*De Prerogativa Regis* 378
See Lunacy. 1.

32 Hen. 8, c. 34, s. 1—*Covenants* - - 674
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29 Car. 2, c. 3—*Frauds* - - - 128
See Vendor and Purchaser. 3.

7 Anne, c. 20, s. 1—*Middlesex Registry* 460
See Bankruptcy. 2.

36 Geo. 3. c. xxxix.—*Private Inclosure Act* 358
See River.

10 Geo. 4, c. xv., ss. 22, 26—*Special Act* - 669
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3 & 4 Will. 4, c. 27, s. 42—*Real Property Limitation* - - - - 111
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5 & 6 Will. 4, c. 50, ss. 67, 68—*Highways* 515
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8 & 9 Vict. c. 20, s. 6—*Railways Clauses* 394
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10 & 11 Vict. c. 15, s. 29—*Gasworks Clauses* 614
See Gas Company.

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See Highway.

15 & 16 Vict. c. 85, ss. 25, 26—*Burial* - 191
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16 & 17 Vict. c. 134, s. 6—*Burial* - 191
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16 & 17 Vict. c. 137, ss. 62, 66—*Charitable Trusts* - - - - 687
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17 & 18 Vict. c. 112, s. 30—*Literary and Scientific Institutions* - - 72
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18 & 19 Vict. c. 120, s. 98—*Metropolis Management* - - - - - 603
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18 & 19 Vict. c. 124, s. 29—*Charitable Trusts* 44
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25 & 26 Vict. c. 89, ss. 16, 38, 101—*Companies* 428
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30 & 31 Vict. c. 131, s. 25—*Companies* - 556
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34 & 35 Vict. c. 41, s. 9—*Gasworks Clauses* 614
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36 & 37 Vict. c. 66, s. 25, sub-s. 8—*Judicature* 573
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37 & 38 Vict. c. 57, s. 8—*Real Property Limitation* - - - - 499
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38 & 39 Vict. c. 55, ss. 13, sub-s. 1, 15, 16, 17, 144—*Public Health* - - 515
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38 & 39 Vict. c. 77, s. 10—*Judicature* - 428
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42 & 43 Vict. c. 76, s. 5—*Companies* - 28
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44 & 45 Vict. c. 41, s. 19, sub-s. 1 (*i*); ss. 20, 21, sub-s. 2—*Conveyancing and Law of Property* - - - - 230
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44 & 45 Vict. c. 44, General Order, Sched. I.—*Solicitors' Remuneration* - - 538
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45 & 46 Vict. c. 38, ss. 2, 3, 20, 22, 38, 45, 50—*Settled Land* - - - 96
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45 & 46 Vict. c. 61, s. 55—*Bills of Exchange*
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46 & 47 Vict. c. 52, ss. 20, 44, 50 sub-s. 5, 56, 57, 168—*Bankruptcy* - - 182
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46 & 47 Vict. c. 57, ss. 23, 87—*Patents, Designs, and Trade Marks* - - 484
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51 & 52 Vict. c. 50, s. 17—*Patents, Designs, and Trade Marks* - - - 432
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51 & 52 Vict. c. 52, s. 3—*Public Health—Buildings in Streets* - - 331
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51 & 52 Vict. c. 59, s. 8—*Trustee* - 142
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53 & 54 Vict. c. 69, s. 4—*Settled Land* - 96
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56 & 57 Vict. c. 61, s. 1, sub-s. (*b*)—*Public Authorities Protection* - - 145
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57 & 58 Vict. c. 30, s. 2, sub-s. 1 (*b*); s. 4; s. 7, sub-s. 7; s. 8, sub-s. 4; s. 9, sub-ss. 1, 5, 6, 7; s. 14, sub-s. 1—*Finance Act* 643
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59 & 60 Vict. c. 35, s. 1, sub-ss. 1, 2, 4—*Judicial Trustees* - - - - 352
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59 & 60 Vict. c. 35, s. 3—*Judicial Trustees* 521
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60 & 61 Vict. c. ccxlii. s. 42, sub-s. 1 (*c*)—*London County Council—Improvements*
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—— Costs unnecessarily incurred — Affidavits filed by defendant during stay - 405
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—— "Improvement charge" — "Improvement area"—"Lands all or any part of which abut" on a street - - - 491
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TAX—Income tax—Salary of chaplain—Charitable institution - - - 669
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TAXATION—Costs—Charges and expenses of Liverpool solicitors' attendances in London - - - - 443
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—— Costs—Public Authorities Protection Act
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TENANT—Successive assignments—Covenants—"Property" of bankrupt - - 182
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TENANT FOR LIFE—Sale by—Appointment of trustees of compound settlement - 96
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—— Sale by—Payment of money into court—"Option" - - - - 660
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THIRD PARTY—Documents in solicitor's possession before action—Right to productions
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TIME—For making award—Arbitrators "called on to act" - - - - - 633
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—— Submission—Application to stay proceedings—"Step in the proceedings" - 92
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TITHES—Charge on great tithes—Inclosure Act—Allotment of lands in lieu of tithes—Transfer of liability to custom - 120
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TRADE — Restraint of—Severable covenant—Contract of hiring and service—Injunction - - - - - 451
See Restraint of Trade.

TRADE DEBT—*Conditional Payment—Effect of giving Cheque or Bill of Exchange—Sale of Debts and Securities—Company—Assignment of Debts.*

A cheque or bill of exchange given in respect of a pre-existing debt operates as conditional payment thereof, and on the condition being performed by actual payment, the payment relates back to the time when the cheque or bill was given.

Defendant sold to the plaintiff company his business as existing on December 31, 1887, with the goodwill, stock-in-trade, and "all book and other debts due to the vendor in connection with the said business, and the full benefit of all securities for such debts." On January 1, 1888, defendant had in his possession cheques and bills of exchange, given for trade debts, which had been received by him before that date and were subsequently honoured:—

Held, that the trade debts, having been paid, did not pass to the company, and that the cheques and bills were not securities within the meaning of the agreement. Felix Hadley & Co. *v.* Hadley - - - - Byrne J. 680

TRADE-MARK—*Registration—Application for—Resemblance to Registered Marks—"Entry made without sufficient cause"—Motion to expunge such Marks—Bonâ fide Intention to Use—Non-user—Rectification of Register—Patents, Designs, and Trade Marks Acts; Act of* 1883 (46 & 47 *Vict. c.* 57), *ss.* 65, 72, 75, 76, 90; *Act of* 1888 (51 & 52 *Vict. c.* 50), *s.* 17—*Practice—Appeal—Oral Evidence below—Judge's Notes.*

A trader cannot properly register a trade-mark for goods in which he does not deal, or in which he has not, at the time of registration, some definite and present intention to deal.

The enactment in s. 75 of the Act of 1883, that "registration of a trade-mark shall be equivalent to public use of the trade-mark," as altered by s. 17 of the Act of 1888, substitutes registration for previous user and reputation gained thereby, but does not mean that continued registration is equivalent to continued user. The "public use" referred to in these sections is not use since registration, but use and reputation at the time of application.

Where there had been no real user of a trade-mark before or since its registration, and it had been registered in a particular class, without any bonâ fide intention to use it in that class, the Court, on an application made under s. 90 of the Act of 1883 by another trader to register a nearly identical mark in respect of that particular class, rectified the register by expunging the existing mark as an entry made without sufficient cause; and directed the comptroller to proceed with the registration of the applicant's mark

The decision of Romer J. affirmed. *In re* Registered Trade-marks of John Batt & Co. *In re* Carter's Application for a Trade-mark
See also Practice. 1. **C. A. 432**

TRANSFER—Consols—Form of order—Lunatic sole trustee—Vesting order - 324
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TRUSTEE—*Accounts—Carrying back Account—Administration Action—Statutes of Limitation—Order, Form of—Trustee Act,* 1888 (51 & 52 *Vict. c.* 59), *s.* 8.

Form of order for account by trustees entitled to the protection given by s. 8 of the Trustee Act, 1888, against liability to render accounts extending beyond six years from the commencement of the action. *In re* Davies. Ellis *v.* Roberts - - - Kekewich J. 142

2. —— *Breach of Trust—Executor—Outstanding Estate—Debt secured by Promissory Note—Loss to Estate—Liability—Relief—Acting "honestly and reasonably"—Judicial Trustees Act,* 1896 (59 & 60 *Vict. c.* 35), *s.* 3, *sub-s.* 1.

A testator by his will gave his real and personal estate to his executors and trustees upon trust to maintain the same in the like mode of investment as at his death until one of his sons should attain the age of twenty-four. The estate comprised a debt of 166*l.* due upon a promissory note payable upon demand; the executors, believing the debtor to be a man of good credit, neither called in, nor applied to the Court for directions as to this debt; the debtor died insolvent eighteen months after the testator; and the estate suffered a loss:—

Held, that, having regard to the terms of the will and the amount of the debt, the executors might reasonably have thought they were not bound either to call in the debt or to apply for directions, and that, under the circumstances, having acted honestly and reasonably, they ought to be relieved, under s. 3 of the Judicial Trustees Act, 1896, from their breach of trust and from personal liability for the same.

The decision of Kekewich J. affirmed. *In re* Grindey. Clews *v.* Grindey - **C. A. 593**

3. —— *Breach of Trust—New Trustees—Retiring Trustees. Liability of—Unauthorized Investments—Order against Trustees—Trustees taking over Securities—Cestui que Trust—Infant—Claim against Co-trustee—Indemnity—Solicitor—Third Party Notice.*

To make a retiring trustee liable for a breach of trust committed by his successor, it must be proved that the very breach of trust which was in fact committed was not merely the outcome of or rendered easy by the retirement and new appointment, but was contemplated by the

TRUSTEE—*continued.*

former trustee when the retirement and appointment took place.

Where one of two trustees by whom a breach of trust is committed is a solicitor, he cannot, merely because he is a solicitor, be required to indemnify his co-trustee where that co-trustee has himself been an active participator in the breach of trust and has not participated in it merely in consequence of the advice and control of the solicitor.

The rule of equity that trustees who have caused a loss by investing trust funds on an authorized security cannot be required by the cestui que trust to make good the loss without having the security transferred to themselves, does not apply where the cestui que trust is an infant; he being entitled to have the trust fund made good by the trustees notwithstanding the security cannot be transferred to them.

In re Salmon, (1889) 42 Ch. D. 351, considered. HEAD *v.* GOULD - **Kekewich J. 250**

4. —— *Breach of Trust—Relief of Trustees from Personal Liability under s. 3 of Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35).

Where trustees, erroneously assuming that they had a power of sale, sold settled leaseholds and thereby diminished the income of the plaintiff, who, as tenant for life of a moiety, was entitled to rents and profits in specie, but the sale would have been a proper one if the trustees had in fact possessed a power of sale:—

Held, that as the trustees had acted honestly and reasonably, they were entitled under s. 3 of the Judicial Trustees Act, 1896, to be relieved from personal liability in respect of the breach of trust, and that an action by the plaintiff to make them personally liable for the diminution of her income must be dismissed.

The meaning and application of the section considered. PERRINS *v.* BELLAMY
Kekewich J. 521

5. —— *Judicial Trustee — Appointment — Application by Beneficiary — Sole Executor — "Trustee"—Administration — "Trust" — Reversioner—Remuneration of Trustee—Discretion of Court—Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 1, *sub-ss.* 1, 2, 4.

A person interested in an estate is not entitled as of right to the appointment of a judicial trustee under the Judicial Trustees Act, 1896, but the appointment is, under s. 1, sub-s. 1, a matter entirely within the discretion of the Court.

Thus where the reversioner under a will applied under the Act for the appointment of a judicial trustee to act either alone or jointly with the testator's widow, who was sole executrix and also tenant for life (there being no trustee appointed by the will), the Court refused the application, as it was opposed to her wish and to the testator's manifest intention, which was that she should have the sole control of his estate, there being, moreover, no ground of complaint against her: nor was the fact that the applicant offered that the remuneration of the judicial trustee, when appointed, should come out of capital and not out of income held to justify the application.

Under s. 1, sub-s. 2, of the Act, the administration of the property of a deceased person is a "trust," and the executor is a "trustee": so that, under sub-s. 1, the Court can, in a proper case, remove the executor and appoint a judicial trustee in his place, to whom, under sub-s. 4, it can give directions as to the administration of the trust. *In re* RATCLIFF - **Kekewich J. 352**

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VENDOR AND PURCHASER — *Conditions of Sale—Power to Rescind—Effect of Commencing Litigation—Costs.*

Property was sold under conditions of sale empowering the vendor by notice to rescind the sale if any objection should be insisted on which the vendor should be unable to remove, "notwithstanding any intermediate negotiation," and that on rescission the purchaser should be entitled to receive back his deposit without interest or costs. The condition was silent as to intermediate litigation. The purchaser insisted on an objection that the particulars misrepresented that the property was freehold, and that the title shewn was only to a term under an underlease; and on this ground he commenced an action on November 30, 1896, for rescission of the contract, return of his deposit, and payment of the expenses of investigating the title.

Before further proceedings were taken the vendor, on December 4, 1896, gave the purchaser notice of the rescission of the contract, and offered to repay the deposit. On the evidence it was held that the misrepresentation was not made out:—

Held, that the notice was in time, and that the purchaser was only entitled to a return of his deposit without interest, and to the costs of the action up to the time of the receipt of the

VENDOR AND PURCHASER—*continued.*

notice to rescind, and that he must pay the defendant's costs as from that date. Isaacs *v.* Towell - - - - - Byrne J. 285

2. —— *Contract for Sale of Lands—Delay in Completion—Defect in Title unknown to Vendor—"Default"—Interest.*

A clause in a contract for the sale of lands provided that, if from any cause whatever other than the "default of the vendor," the purchase should not be completed by the day fixed, the purchaser should pay interest until completion. Upon investigation of the title a defect in it was discovered by the vigilance of the purchaser's advisers, which was not known to or suspected by the vendor when he entered into the contract, and the time occupied in remedying the defect delayed the completion of the purchase for nearly three months after the day fixed. The purchaser did not have, and keep, his money ready at the proper time, making no interest of it:—

Held, affirming the decision of Romer J., [1898] 1 Ch. 433, that, there being no want of reasonable care on the part of the vendor and no abstention from doing anything that he ought to have done, the delay was not attributable to his "default," and that the purchaser must pay interest until completion.

In re Young and Harston's Contract, (1885) 31 Ch. D. 168, 174, and *Williams* v. *Glenton*, (1866) L. R. 1 Ch. 200, observed upon by Collins L.J. *In re* Woods and Lewis' Contract C. A. 211

3. —— *Specific Performance—Memorandum of Agreement—"Subject to Approval of Form of Agreement"—Condition Precedent—Mistake—Rescission—Statute of Frauds* (29 *Car.* 2, *c.* 3)—*Form of Order—Interest—"Wilful Default."*

By "heads of agreement" between a vendor and purchaser it was agreed that the purchaser should purchase "36 acres of land," the boundaries of which were thereby accurately defined on three sides but not on the fourth, for 3600*l.*, "subject to approval of conditions and form of agreement by purchaser's solicitor." The vendor afterwards discovered that the land which he supposed formed the subject-matter of the contract measured out at 42 acres, and required the purchaser to take the whole 42 acres at 4200*l.*, being 100*l.* per acre. The purchaser, however, insisted that the contract should stand for the sale of 36 acres only, and brought an action for specific performance on that footing:—

Held, that the purchaser was entitled to specific performance on three grounds: (1.) that the fourth boundary could be readily fixed so as to include 36 acres; (2.) that the "heads of agreement" constituted a complete contract, and that the clause, "subject to approval, &c.," was not a condition precedent to a complete contract; and (3.) that there was no such mistake as entitled the vendor to rescission.

Form of Order.

The contract contained a stipulation that if the purchase was not completed by the day named, the purchase-money should bear interest at 4 per cent. from that day until actual completion:—

Held, that the vendor's repudiation of the contract by resisting the purchaser's claim to specific performance did not constitute such "wilful default" as to disentitle him to interest. North *v.* Percival - - Kekewich J. 128

4. —— *Title—Specific Performance—Mortgagee Vendor—Statutory Power of Sale—Defective Exercise—Conveyancing and Law of Property Act,* 1881 (44 *&* 45 *Vict. c.* 41), *s.* 19, *sub-s.* 1 (*i.*); *ss.* 20, 21, *sub-s.* 2.

The provision in sub-s. 2 of s. 21 of the Conveyancing and Law of Property Act, 1881, that where a conveyance is made in professed exercise of the power of sale conferred on mortgagees by the Act, the title of the purchaser shall not be impeached on the ground that the power was improperly exercised, does not apply until the conveyance has been obtained; consequently, it does not preclude a person who has contracted to purchase from a mortgagee purporting to sell under his statutory power of sale from inquiring whether the vendor was in a position to exercise the power, nor from proving aliunde, in answer to an action for specific performance, that the power was improperly exercised.

Dicker v. *Angerstein*, (1876) 3 Ch. D. 600, explained and distinguished. Life Interest and Reversionary Securities Corporation *v.* Hand-in-hand Fire and Life Insurance Society Stirling J. 230

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WAY-LEAVE—*Rent—Way-leave over Land—Right of Reversioner*—32 *Hen.* 8, *c.* 34, *s.* 1.

The owner in fee of land demised to a railway company for a term of years a way-leave over his land, with the right to make and use a railway thereover, reserving to himself, his heirs and assigns, a periodical payment on coals, &c., carried over any part of the railways comprehended in the company's special Act to Port B. These railways included the one in respect of which the way-leave was granted; but subsequently coal was carried to Port B. over a part of one of the railways comprehended in the Act which was not on the land of the lessor:—

Held, that the amount was payable in respect

WAY-LEAVE—*continued.*
of the hereditaments demised, and on the lessor's death was payable to the reversioner. Lord Hastings *v.* North Eastern Railway Company Byrne J. 674

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WILL — *Advancement Clause* — "*Expectant or Presumptive Share*"—*Impossibility of Issue*—*Woman past Child-bearing*—*Construction of Will.*

Where property is given to B. in the event of A. having a child, the Court will not enter into the question of A. being past child-bearing for the purpose of depriving B. of the chance of becoming entitled to the property.

A testator directed that, in the event of his sister A. marrying and having children, his property should be divided among the children of his sisters A. and B. upon the youngest child attaining twenty-one, but did not provide for the event of A. marrying and having no children; and he empowered his trustees to raise a portion of the expectant, presumptive, or vested share of any child of B. for his or her advancement.

Upon a summons by the trustees to determine whether the power of advancement was exercisable in view of the fact that A. was then a widow of fifty-four years of age, and had never had a child:—

Held (reversing Kekewich J.), that the power continued in operation during the lifetime of A.

Jee v. *Audley*, (1787) 1 Cox, 324, and *In re Dawson*, (1888) 39 Ch. D. 155, followed.

In re Lowman, [1895] 2 Ch. 348, explained and distinguished. *In re* Hocking. Michell *v.* Loe - - - - - C. A. 567

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